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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 372

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

vs.

MARION BROWN ELLIOTT, HORACE F. PHELPS, CITY BANK FARMERS TRUST COMPANY, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SURROGATES' COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1937.

CERTIORARI GRANTED NOVEMBER 14, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 372

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

vs.

MARION BROWN ELLIOTT, HORACE F. PHELPS, CITY BANK FARMERS TRUST COMPANY, ET AL., ETC.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 30, 1938.

—8686

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased

MARION BROWN ELLIOTT, HORACE F. PHELPS, CITY BANK Farmers Trust Company and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, deceased, Appellants,

and

THE STATE TAX COMMISSION, Respondent

STATEMENT UNDER RULE 234

This proceeding was commenced by the filing of a petition for the Designation of an Appraiser on or about the 21st day of January, 1933, by Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company and The Colorado National Bank of Denver, as Executors of the Last [fol. 2] Will and Testament of Katherine H. Brown, deceased, and the entry of an order making such Designation on or about the 26th day of January, 1933. The New York Estate Tax Return and Schedules were thereupon filed and on or about the 27th day of November, 1933, the Appraiser filed his report upon which a pro forma order assessing the tax was entered and filed in the Office of the Clerk of Surrogate's Court, New York County, on the 28th day of November, 1933.

The said Appraiser's Report reported subject to the New York Estate Tax (Article 10-C of the Tax Law), and the taxing order assessed a tax, on the transfer of the principal of a certain trust fund established by the decedent with the Denver National Bank of Denver, Colorado, as Trustee, in December, 1924, while she was a resident of the State of Colorado, of securities then and ever since held in Colorado, over which trust she reserved a right of revocation which was never exercised up to the date of her death on December 11, 1931; the grantor, in the meantime, possessed of the power of revocation, having changed her domicil from the State of Colorado to the State of New York, died here on December 11, 1931, a resident of this State.

A notice of appeal from the pro forma order was thereafter served and filed in the Office of the Clerk of the Surrogate's Court, New York County, and after argument and due consideration the appeal was denied and the pro forma order fixing the tax was affirmed by order entered in the office of the Clerk of said Court on the 26th day of November, 1934.

A notice of appeal herein from said order to the Appellate [fol. 3] Division of the Supreme Court, First Department, was served on the 31st day of December, 1934, and on said day was filed in the Office of the Clerk of said Surrogate's Court.

The names of the parties are as given above. There has been no change of parties since the commencement of the proceeding. The appellants above named appeared in the Estate Tax proceeding and on the appeal from the pro-forma order by their attorneys, Towsley & Bangs. They appear herein by their attorney, Frederick C. Bangs. The State Tax Commission, the respondent, appears by its attorney, Edgar Hirschberg, Esq.

[fol. 4] IN SURROGATE'S COURT, COUNTY OF NEW YORK

P21—1932

In the Matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please Take Notice that Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, deceased, do hereby appeal to the Appellate Division of the Supreme Court in and for the First Judicial Department from the order of the Surrogate's Court of the County of New York in the above entitled proceeding, entered in the Office of the Clerk of said Court on the 26th day of November, 1934, which denied the appeal from and affirmed the pro forma order and determination of the Surrogate, entered in the Office of the Clerk of said Court on the 28th day of Novem-

ber, 1933, fixing the estate tax upon the estate of said decedent, and from said latter order and determination of the Surrogate, upon the grounds of error specified in the Notice of Appeal from the aforesaid pro forma order of November 28th, 1933, filed in the Office of the Clerk of the Surrogate's Court of the County of New York on the 27th [fol. 5] day of January, 1934, pursuant to Section 249-X of the New York Tax Law.

Yours, etc., Frederick C. Bangs, Attorney for Executors, Appellants, 38 West 44th Street, New York, N. Y.

To Charles P. Sheridan, Esq., Clerk of Surrogate's Court, County of New York. Edgar Hirschberg, Esq., Attorney for State Tax Commission.

[fol. 6] In Surrogates' Court, County of New York

Present: Hon. James A. Foley, Surrogate.

P21—1932

In the Matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased

Order Denying Appeal and Affirming Order Fixing Tax

Order Appealed From—November 26, 1934

An appeal having been taken to this Court by the Executors of the above named estate, from the pro forma order fixing the estate tax in the Surrogates' Court of New York County on the 28th day of November, 1933, said appeal having come on to be heard, and after hearing Towsley & Bangs, Attorneys for the Executors, Frederick C. Bangs, of Counsel; in favor of said appeal and Edgar Hirschberg, in opposition thereto and due deliberation having been had thereon,

Now, on motion of Edgar Hirschberg, Attorney for the State Tax Commission and upon the Decision of the Court, filed herein, it is hereby

Ordered and Adjudged that the appeal be and the same is hereby denied and the pro forma order fixing the tax is affirmed.

J. A. F., Surrogate.

[fol. 7] IN SURROGATES' COURT, COUNTY OF NEW YORK

SCHEDULE OF ESTATE TAX RETURN

(Pursuant to stipulation appearing herein at page 74, only Schedules E and L of the Estate Tax Return and Schedules are printed herein as relevant to this appeal.)

Schedule E

Transfers

Item No.	Description	Values as Appraised in this Proceeding Amount
	On December 30, 1924, Katherine H. Brown, while still a resident of Denver, Colorado, created an inter vivos trust with The Denver National Bank of Denver, Colorado, as Trustee, by Deed of Trust executed and delivered on that day. A copy of said Deed of Trust is submitted herewith. For the information of the State Tax Commission a list of the securities and cash making up the trust fund with values as of December 11, 1931, the date of death, is included herein as Schedule E of the tax return. The estate, however, contends that the transfer of this fund is not taxable in New York State in that it had, prior to the date of death of the grantor, acquired a business situs in Denver, Colorado. An inheritance tax has already been assessed and [fol. 8] paid to the State of Colorado on the basis of the fund having acquired a business situs. The tax so paid the State of Colorado on said trust fund was in the amount of $15,653.82 or 73.32% of a total tax paid the State of Colorado of $21,350.30, the balance of said tax being allocated to the Colorado real estate. Attached hereto and made a part of Schedule E is a receipt from the Treasurer of the State of Colorado set-	

Schedule E—Transfers—Continued

Item No.	Description	Values as Appraised in this Proceeding Amount
	ting out the assessment by and payment of the inheritance tax to that State. The allocation of the tax between real estate and the trust fund having acquired "a business and actual situs in the State of Colorado" is set out in a letter dated December 19, 1932, from Messrs. Benedict & Phelps, the attorneys representing the estate in the State of Colorado, the first paragraph of which is as follows: "Relative to the New York State Inheritance Tax due from the above estate, for your information of the $21,350.30 paid the State of Colorado for Inheritance Tax there should be allocated to the real property in Colorado 26.68% of the tax, which is $5,696.18, and to the trust estate held by the [fol. 9] Denver National Bank 73.32% of the amount of the tax, or $15,653.82. This is based on the total valuation of the Inheritance Tax Commissioner of Colorado—$362,447.03, of which $96,680.00 is the appraised value of the real property, and $265,767.03 the value of the property transferred to the Denver National Bank in trust."	
1	$10,000 State of Alabama Public Road Highway and Bridge 4½s, Ser. "B," dated June 1, 1923, due June 1, 1943, int. June & Dec. 1, at 87½	$8,750.00
	Accrued interest	12.50
2	$10,000 Allegheny County, Pa., County Road 4s, Ser. 10; issued to provide a fund for the permanent improvement of certain Public Roads or Highways, etc., dated Feb. 1, 1908, due Feb. 1, 1938, int. Feb. & Aug. 1, at 97½	9,750.00
	Accrued interest	144.44

Schedule E—Transfers—Continued

Item No.	Description	Values as Appraised in this Proceeding Amount
3	$10,000 Cincinnati, Ohio Bd. of Education of the City School District, Cincinnati Bldg. Fund 4½s, dated Mar. 1, 1923, due Sept. 1, 1947, int. Mar. & Sept. 1, at 103	10,300.00
	Accrued interest	125.00
4	$10,000 Dallas, Tex. Waterworks Imp. 4½s, [fol. 10] dated Feb. 1, 1924, due Feb. 1, 1952, int. Feb. & Aug. 1, at 91	9,100.00
	Accrued interest	162.50
5	$10,000 Duquesne Light Company 1st Mtge. Ser. A 4½s, dated Apr. 1, 1927, due Apr. 1, 1967, int. Apr. & Oct. 1, at 99⅛	9,912.50
	Accrued interest	87.50
6	$25,000 El Paso County, Colo., School Dist. #11, School 4½s, dated Jan. 2, 1923, due Jan. 1, 1936, int. Jan. & July 1, at 100	25,000.00
	Accrued interest	500.00
7	$10,000 Erie R. R. Company, Erie and Jersey R. R. Co. 1st Mtge. 50 Yr. S. F. Coupon 6s, dated July 1, 1905, due July 1, 1955, int. Jan. & July 1, at 82	8,200.00
	Accrued interest	266.67
8	$2,000 Fremont County, Colo., School Dist. #2, School 5s, dated Nov. 1, 1919, due Nov. 1, 1949, int. May & Nov. 1, at 100	2,000.00
	Accrued interest	11.11
9	$10,000 State of Illinois Service Compensation 4½s, Ser. D, dated Apr. 1, 1924, due Aug. 1, 1938, int. Aug. 1 annually, at 97½	9,750.00
	Accrued interest	162.50
10	$10,000 Kansas City, Mo., Waterworks 4½s, 4th Issue, dated July 1, 1922, due July 1, 1942, int. Jan. & July 1, at 100	10,000.00
	Accrued interest	200.00
11	[fol. 11] $10,000 Knoxville, Tenn., Public Imp. 4¾s, dated Nov. 1, 1923, due Nov. 1, 1939, int. May & Nov. 1, at 85¼	8,525.00
	Accrued interest	52.78

Schedule E—Transfers—Continued

Item No.	Description	Values as Appraised in this Proceeding Amount
12	$10,000 Los Angeles, Calif. Election of 1922, Sewage Disposal Class "B" 5s, dated Feb. 1, 1924, due Feb. 1, 1951, int. Feb. & Aug. 1, at 107¾	10,775.00
	Accrued interest	180.55
13	$10,000 Memphis, Tenn., Water Dept. 5s, dated July 1, 1923, due July 1, 1957, int. Jan. & July 1, at 87¼	8,725.00
	Accrued interest	222.22
14	$30,000 New York City, N. Y. Corp. Stock for Construction of Rapid Transit R. R. 4¼s, dated Feb. 15, 1926, due Feb. 15, 1976, int. Feb. & Aug. 15, at 76	22,800.00
	Accrued interest	410.83
15	$10,000 New York City, N. Y. Corp. Stock to Provide for the Supply of Water 4¼s, dated Feb. 15, 1926, due Feb. 15, 1976, int. Feb. & Aug. 15, at 76	7,600.00
	Accrued interest	136.94
16	$10,000 Omaha, Neb. 4½s to Finance Street Improvements, dated Mar. 1, 1924, due Mar. 1, 1939, int. Mar. & Sept. 1, at 99½	9,950.00
	Accrued interest	125.00
17	$10,000 Oregon Veterans State Aid 4¼s, [fol. 12] Ser. #2, dated Oct. 1, 1922, due Oct. 1, 1948, int. Apr. & Oct. 1, at 94½	9,450.00
	Accrued interest	82.64
18	$10,000 Portland, Ore., Water $4 Bonds, dated Apr. 1, 1924, due Apr. 1, 1954, int. Apr. & Oct. 1, at 90	9,000.00
	Accrued interest	77.78
19	$25,000 Pueblo, Colo., School Dist. #1, School Bldg. 4½s, dated Feb. 1, 1923, due as follows: $1,000 due Feb. 1, 1942 7,000 " Feb. 1, 1945 12,000 " Feb. 1, 1948 5,000 " Feb. 1, 1950 int. Feb. & Aug. 1, at 100	25,000.00
	Accrued interest	406.25

Schedule E—Transfers—Continued

Item No.	Description	Values as Appraised in this Proceeding Amount
20	$10,000 Richmond, Va., Gen. Imp. Ser. 0-3 4½s, dated Jan. 1, 1924, due Jan. 1, 1958, int. Jan. & July 1, at 98½	9,850.00
	Accrued interest	200.00
21	$10,000 Southern Pacific Company 40 Yr. 4½s of 1929, dated May 1, 1929, due May 1, 1969, int. May & Nov. 1, at 67½	6,750.00
	Accrued interest	50.00
22	$10,000 State of Tennessee Coupon Ref. 4s, dated July 1, 1915, due July 1, 1941, int. Jan. & July 1, at 86¼	8,625.00
	Accrued interest	177.78
23	$10,000 State of West Va. Coupon 4½s, Ser. [fol. 13] of 1923, dated Apr. 1, 1923, due Apr. 1, 1943, int. Apr. & Oct. 1, at 102¼	10,225.00
	Accrued interest	87.50
24	$10,000 State of Michigan Ref. Highway Imp. 4s, dated May 1, 1925, due May 1, 1940, int. May & Nov. 1, at 96	9,600.00
	Accrued interest	44.44
25	$1,000 The Moffatt Tunnel Imp. Dist. 5½s, dated July 1, 1923, due July 1, 1956, int. Jan. & July 1, at 107	1,070.00
	Accrued interest	24.44
26	Cash	1,108.16
	Total—Schedule E	$265,767.03

Summary Statement

Securities (fair market value at date of death)	$260,707.50
Accrued interest thereon	3,951.37
Cash	1,108.16
Grand Total	$265,767.03

[fol. 14] Copy

Estate No. — Receipt
County Court of Denver County. No. 56997.

Receipt for Inheritance Tax

Office of the Treasurer of the State of Colorado

June 10, 1932.
Andrew Hernon, Inheritance Tax Commissioner.

$21,350.30. Denver, Colo., June 10, 1932.

Received of The Executors of the estate of Katherine H. Brown, deceased, Twenty One Thousand Three Hundred Fifty and 30/100 Dollars for Inheritance Tax and fees for examination and issuance of waiver, as itemized below, due to the State of Colorado from said estate, pursuant to an order of the Hon. G. A. Luxford, Judge of the County Court of Denver County. Date of death of decedent Dec. 11, 1931. Value of property, gross $362,447.03 deductions 17,171.58 net 345,275.45.

Description of property:

Lots 11 and 12, Block 196, East Denver, City and County of Denver, State of Colorado	$85,000.00
Lot 11 Block 45, East Denver, City and County of Denver, State of Colorado	10,000.00
Lots 16 to 30 Inc. Block 25, Chamberlain's Colfax Addition, City and County of Denver, State of Colorado	1,000.00
Mining Claims in the Roaring Fork Mining District, Pitkin County, Colorado, as follows,	
[fol. 15] Durgen Lode Mining Claim, U. S. Survey #16655,	
Multenoma Lode Mining Claim, U. S. Survey #14822	
Und. 9/10 Int. Pride of the Hills Lode Mining Claim, U. S. Survey #3946	
Und. 18/96 Int. Pioneer Lode Mining Claim, U. S. Survey #1721	
Und. 5/96 Int. Ute Lode Mining Claim, U. S. Survey #5847	
Und. 5/96 Int. Iron Lode Mining Claim, U. S. Survey #5847	
Total	680.00

Transfers of Personal Property by Deed of Trust to the Denver National Bank, Dated December 30, 1924, Reserving Power of Revocation Never Exercised, which personal property at the date of said transfer had, and ever since said date, has continued to have a business and actual situs in the State of Colorado	265,767.03
	$362,447.03*

Memo Receipt

Tax fixed by order of court	$22,463.47
Interest	
Fees, examination and waiver	10.00
Total	$22,473.47
Discount	$1,123.17
	$21,360.30*

John M. Jackson, Treasurer of the State of Colorado, by Burns Wiel, Deputy.

[fol. 16]

Schedule L

Beneficiaries

Name and Address	Relationship	Nature and Extent of Interest
M on Brown Elliott (32 years of age), Harrison, Westchester Co., New York.	Daughter	$250,000, personal effects, and life estate in residuary estate; Executrix and Trustee
Nixon Elliott, Jr. (10 years of age), Harrison, Westchester Co., New York.	Grandson	Second life estate in residuary estate
Marion Brown Elliott (12 years of age), Harrison, Westchester Co., New York.	Granddaughter	Second life estate in residuary estate
Nina McClure, 536 Fullerton Ave., Corona, Calif.	Sister	$2,500, and annuity of $2,400
Marion McClure, 536 Fullerton Ave., Corona, Calif.	Niece	$500, and annuity of $1,200 upon death of her mother, Nina McClure
George McClure 536 Fullerton Ave., Corona, Calif.	Nephew	$500
William McClure, 536 Fullerton Ave., Corona, Calif.	Nephew	$500

Schedule L—Beneficiaries—Continued

[fol. 17]

Name and Address	Relationship	Nature and Extent of Interest
Robert McClure, 536 Fullerton Ave., Corona, Calif.	Nephew	$500
Mae Brown, 318 18th Avenue, Seattle, Washington.	None	$1,000, and annuity of $1,200
Gertrude Leiendecker, 318 18th Avenue, Seattle, Washington.	None	$1,000
Mabel Brown (deceased)	None	—
Children's Hospital Association, Denver, Colorado.	—	Remainder of residuary estate
Horace F. Phelps, c/o Benedict & Phelps, Denver, Colorado.	None	Executor and Trustee
The Colorado National Bank of Denver, Denver, Colorado.	—	Executor and Trustee
City Bank Farmers Trust Company, 22 William Street, New York, N. Y.	—	Executor and Trustee

[fol. 18] In Surrogate's Court, County of New York

Last Will and Testament of Katherine H. Brown, Dated December 1, 1931

I, Katherine H. Brown, of the City and County of Denver, State of Colorado, being of sound and disposing mind and memory, do hereby make, publish and declare this my Last Will and Testament in the manner and form following:

Item I. I direct that my just debts be paid as soon after my death as practicable.

Item II. I give and bequeath unto my daughter, Marion Brown Elliott, all of my personal effects, household goods, jewelry and automobiles.

Item III. I give and bequeath unto my daughter, Marion Brown Elliott, the sum of Fifty Thousand ($50,000.00) Dollars in cash, to be paid as soon after my death as funds for that purpose can be realized. And I give and bequeath unto my said daughter the further sum of Fifty Thousand ($50,000.00) Dollars in cash annually thereafter for four (4) years, until the total sum of Two Hundred Fifty Thousand ($250,000.00) Dollars shall have been paid.

Item IV. I give and bequeath unto my sister, Nina McClure, should she survive me, the sum of Twenty-five Hundred ($2500.00) Dollars in cash.

Item V. I give and bequeath unto my sister, Nina McClure, should she survive me, the sum of Five Thousand ($5,000.00) Dollars per year, payable in twelve (12) equal monthly instalments, so long as she remains a widow, and, in the event she marries, from and after such event the [fol. 19] sum of Twenty-four Hundred ($2400.00) Dollars per year, payable in equal monthly instalments, so long as she shall live.

Upon the death of my said sister, Nina McClure, or if she be not living at the time of my death, I give and bequeath unto her daughter, Marion McClure, the sum of Twelve Hundred ($1200.00) Dollars per year, payable in monthly instalments so long as she shall live.

Item VI. I give and bequeath unto Mae Brown, of Seattle, Washington, niece of my late husband, should she survive me, the sum of One Thousand ($1,000.00) Dollars in cash, and the further sum of Twelve Hundred ($1200.00) Dollars per year, payable in monthly instalments so long as she shall live.

Item VII. I give and bequeath unto Gertrude Leiendecker, of Seattle, Washington, should she survive me, the sum of One Thousand ($1,000.00) Dollars in cash.

Item VIII. I give and bequeath unto Mabel Brown, niece of my said husband, the sum of Fifty ($50.00) Dollars per month so long as she shall live.

Item IX. I give and bequeath to Marion McClure, George McClure, William McClure and Robert McClure, children of my sister, Nina McClure, the sum of Five Hundred ($500.00) Dollars each.

Item X. I hereby nominate and appoint Marion Brown [fol. 20] Elliott and Jack Phelps of Denver and Colorado National of Denver and Bank of America in New York executors and trustees of this my Last Will and Testament; and I give, devise and bequeath unto said executors and trustees, or the survivors or survivor of them, all the rest, residue and remainder of my estate of every kind and character, wheresoever situate and to which I may be entitled at the time of my death, In Trust, Nevertheless, to take, hold, man-

age and care for the same and to collect the rents, income and profits therefrom and pay the legacies herein other than the annuities herein provided out of the principal of my estate, and after payment of the annuities hereinabove provided, to pay the remainder of the net income to my daughter, Marion Brown Elliott, in not less than quarterly instalments, so long as she shall live; upon the death of my said daughter, to pay the remainder of said net income to her children, share and share alike, or the survivor or survivors of them, so long as they or any of them shall live. Upon the death of the survivor of the said children of my daughter, Marion Brown Elliott, to pay and distribute the principal of my estate to the Children's Hospital Association, of Denver, Colorado.

Item XI. I hereby give and grant unto said executors and trustees full power and authority to invest and reinvest the funds constituting the trust herein created in government or municipal bonds, or in such securities as to them shall seem proper, and they shall not be limited in any investment [fol. 21] by the Statutes of the State of Colorado as to the investment of trust funds, hereby giving and granting upon my said executors and trustees, or the survivor of them, full power and authority to sell and convey any or all of the assets of my estate, real and personal, for such price and upon such terms as to them shall seem wise, and to make, execute and deliver such deeds of conveyance or instruments of writing as may be necessary or proper for the conveyance and transfer of any real or personal property belonging to my estate or constituting all or part of the trust created here under. The powers of said executors and trustees hereunder are without any duty resting upon any person dealing with them to see to the application of any money or other property delivered to them, and in addition said executors and trustees shall have the full and uncontrolled discretion and authority to take and continue to hold as part of my estate or as trust investments hereunder, so long as they shall deem best, and without liability for depreciation or loss through error of judgment, any and all real estate, stocks, bonds, securities or assets belonging to me at the time of my death, but with full power and authority to dispose of, call in, change, or make new investments for the benefit of my said estate. And I direct that the executors and trustees named herein be permitted to administer upon my said

estate and execute the trust hereunder without giving bond or security therefor.

Item XII. I hereby revoke any and all wills heretofore by me made.

[fol. 22] In Witness Whereof, I hereunto subscribe my name and declare this instrument to be my Last Will and Testament this 1st day of December, A. D. 1931, in the presence of the attesting witnesses hereto.

Katherine H. Brown. (Seal.)

The foregoing instrument was subscribed, sealed, published and declared by Katherine H. Brown to be her Last Will and Testament in our presence and in the presence of each of us, and we, at the same time, at her request and in her presence and in the presence of each other, hereto subscribe our names as attesting witnesses this 1st day of December, A. D. 1931.

Charles J. Wannemacher of White Plains, N. Y. Grace S. Sutphin of New York City. Pauline I. Grimes of Denver, Colorado.

[fol. 23] In Surrogates' Court, County of New York

Trust Indenture of Katherine H. Brown, Dated December 30, 1924

This Indenture made this 30th day of December, A. D. 1924, by and between Katherine H. Brown, of the City and County of Denver, State of Colorado, party of the first part herein, and the Denver National Bank of Denver, Colorado, a corporation duly organized and existing under and by virtue of the National Banking Laws of the United States (hereinafter called the trustee), as trustee, party of the second part, Witnesseth:

That Whereas, the said party of the first part is desirous of making adequate provision for the support and maintenance of her daughter, Marion K. Brown Elliott, for and during her natural life, and is desirous of providing such maintenance and support by assigning and transferring to said trustee certain bonds and securities in trust subject to the terms and conditions hereinafter expressed; and

Whereas, the said trustee has agreed to assume and execute said trust, subject to the terms and conditions thereof.

Now, Therefore, This Indenture Witnesseth:

That Katherine H. Brown, party of the first part herein, in consideration of the premises and sum of One Dollar ($1.00) to her in hand paid by the said trustee, receipt whereof is hereby acknowledged, and in order to secure the performance of the provisions hereof, has granted, bargained, sold, transferred, assigned, set over and conveyed and by these presents does grant, bargain, sell, transfer, [fol. 24] assign, set over and convey unto the said The Denver National Bank of Denver, Colorado, its successor or successors in trust hereunder forever the following described property and all the right, title and interest of the said Katherine H. Brown therein or thereto, to wit:

United States Fourth Liberty Loan 4¼% bonds, due 1933-1938, dated October 24th, 1918, interest payable April 15th and October 15th, of the face value of	$50,000.00
Colorado Industrial Company 5% Gold Bonds, due 1934, interest payable February 1st and August 1st, of the face value of	25,000.00
Pueblo School District No. 1, 4½% bonds, dated February 1, 1923, due serially, interest payable February 1st and August 1st, of the face value of	25,000.00
Public Service Co. of Colo. 10-yr. Sinking Fund Convertible Gold Debentures, dated Oct. 1st, 1923, due Oct. 1, 1933, interest payable April 1st and October 1st at 7%, Nos. M-1518/1537, inclusive, 20 at $1,000 ea.	20,000.00
Whitaker Paper Co. 1st Mtge. 20-yr. Sinking Fund Gold Bonds, dated Nov. 1st, 1922, due Nov. 1st, 1942, interest payable May 1st and November 1st at 7%, Nos. 217/221, incl.; 727/730 incl.;	
9 at $1,000	9,000.00
Nos. D-241 and 272; 2 at $500 each	1,000.00
[fol. 25] Nevada-California Electric Corp. 1st. Lien Gold Bonds, dated Jan. 1st, 1916, due Jan. 1st, 1946, interest payable Jan. 1st and July 1st at 6%, Nos. M-1328, M-3537/9, incl.; 3541/3742; 3748/51, incl., 10 at $1,000 each	10,000.00

Colorado Farms Co. Gold Secured Notes, dated Jan. 1st, 1924, due Jan. 1st, 1934, interest payable Jan. 1st quarterly at 7%; Nos. 248/267, incl., 20 at $500 ..... 10,000.00

Fremont County, Colo., School District #2, dated Nov. 1st, 1919, due Nov. 1st, 1949, interest payable May 1st and November 1st at 5%; Nos. M-21 and 27, 2 at $1,000 ..... 2,000.00

Huervano County, Colo., High School District Bond, Series 1919, dated October 1st, 1919, due October 1st, 1949, interest payable April 1st and October 1st at 5%, No. 49 ..... 1,000.00

City and County of Denver, Colo., South Denver Improvement Dist. #16, dated July 1st, 1923, due on or before July 1st, 1936, interest payable Jan. 1st and July 1st at 5½%, Nos. 38/47, incl., 10 at $1,000 ..... 10,000.00

City and County of Denver, Colo., Alley Paving District #99, dated Sept. 1st, 1923, due on or
[fol. 26] before Sept. 1st, 1936, interest payable March 1st and Sept. 1st at 5½%;

No. 12 at $1,000 ..... 1,000.00
No. 17 at $500 ..... 500.00

City and County of Denver, Colo., Alley Paving District #100, dated Sept. 1st, 1923, due on or before Sept. 1st, 1936, interest payable March 1st and Sept. 1st at 5½%; Nos. 24/30 inc., 7 at $500 each 3,500.00

City and County of Denver, Colo., Moffat Tunnel Improvement Dist., dated July 1st, 1923, due July 1st, 1952, interest payable Jan. 1st and July 1st at 5½%; Nos. 2838/42 incl.; 2848/52 incl.; 2987/99 incl.; 3014/17 incl.; 25 at $1,000 each 25,000.00

City of Colorado Springs, Colorado, General Obligation Bond for Paving and Improving No. 3 Dist., City of Colorado Springs, dated June 1st, 1923, interest payable June 1st and Dec. 1st at 5%; Nos. 21/30 incl. due June 1st, 1926; 31/40 incl., due June 1st, 1927; 41/45 incl., due June 1st, 1928, 25 at $1,000 each 25,000.00

County of El Paso, Colorado, School Dist., #11, dated Jan. 1st, 1936, interest payable Jan. 1st and July 1st at 4½%; Nos. 326/50 inclusive, 25 at $1,000 each 25,000.00

[fol. 27] To Have and to Hold the above described bonds, property and the income therefrom unto the said party of the second part, its successors and assigns forever, In Trust, Nevertheless, upon the following provisions, terms and conditions:

First. To retain in the present form and character said bonds so long as it shall seem wise to said trustee, with full power from time to time, with the written consent and advice of the said party of the first part, to invest and reinvest said property and securities, and in the event of her death, to invest and reinvest said property and securities in legally authorized investments for trust funds in the State of New York, with full power in connection therewith to sell, exchange, transfer, assign or otherwise dispose of any and all of said bonds, securities or property. No purchaser upon any sale by any trustee hereunder shall be bound to see to the application of the purchase money arising therefrom or inquire into the validity, expediency or propriety of any such sale.

Second. To pay the income from said bonds, securities and property in monthly instalments of One Thousand Dollars ($1,000) each on the first of each and every month, to my daughter, Marion K. Brown Elliott, so long as she shall live, provided that should the income from said bonds, stocks and securities be not sufficient to pay the monthly instalment herein set forth, said instalment shall be proportionately reduced, and in the event said income exceeds the monthly instalments herein mentioned, the excess [fol. 28] thereof shall be added to the instalment of income due and payable on January 1st of each year.

Third. To pay the income arising from said property after the death of my said daughter, Marion K. Brown Elliott, unto her children then living, share and share alike, until such children or any of them attain the age of twenty-five years, at which time an equal proportionate share of the principal of the fund hereby created shall be paid to such child. In the event that no such child or children of my said daughter survive her, then said stocks, bonds and property shall revert to and become part of my estate and be distributed in accordance with the terms and provisions of my last will and testament.

Conditions

The trust hereby created is upon the following express conditions:

First. That the party of the first part herein reserves the right at any time, upon ten days' written notice to the trustee, to change the beneficiary or any of them without the consent of any such beneficiary.

Second. That the said party of the first part herein retains the power to revest in herself title to the corpus of the trust and may, upon ten days' written notice to said trustee, or any successor, revoke said trust and thereupon said trustee, or any successor hereunder, agrees to assign, [fol. 29] transfer, make over and deliver to said party of the first part all of the property, stocks, bonds and securities at the time constituting said trust fund and the trust hereby created shall thereupon be terminated without notice to any beneficiary hereunder.

Third. That the income hereby provided to be paid to my daughter, Marion K. Brown Elliott, or any beneficiary hereunder, shall not be subject to anticipation by her or any of the beneficiaries nor to sale, assignment, pledge, or other transfer of the income or any part thereof, and in case any such anticipation, sale, pledge, assignment or transfer is made or attempted to be made or in case the income from said fund is sought to be attached or levied upon, the interest of my said daughter, or any beneficiary hereunder, in and to said income and each and every part thereof shall immediately cease and determine and all such income shall immediately accrue to and be paid to the party of the first part herein for her use and benefit.

The said trustee shall not be required to take notice of any anticipation, sale, assignment, transfer or pledge, attachment or levy of or against said income. Any of such acts shall ipso facto determine and end all interest of the said Marion K. Brown Elliott or any beneficiary hereunder in and to the income from said fund and each and every part thereof.

Said trustee may be removed and a substitute trustee appointed by the said party of the first part herein, if she be living, and if not living, then by Marion K. Brown Elliott [fol. 30] upon thirty (30) days' notice by an instrument in writing, duly acknowledged, provided that if the said trustee

is removed by Marion K. Brown Elliott, after the death of said first party, no substitute trustee shall be appointed other than a national bank having a paid in capital and surplus of not less than One Million Dollars ($1,000,000.00). Upon the removal of the trustee herein named and the appointment of such substitute trustee, as herein provided, the said party of the second part as such trustee shall assign, tran-fer, and make over all bonds, securities and property then constituting the trust fund to such substitute trustee.

The Trustee

The Denver National Bank of Denver, Colorado, trustee, party of the second part, hereby accepts the trusts in this indenture and agrees to execute the same in accordance with the terms and provisions hereof and subject to the conditions herein set forth.

The trustee or any trustee hereunder may resign and be discharged as such by giving thirty (30) days' written notice to the party of the first part herein and in the event said first party shall not be living at the time, by giving thirty (30) days' written notice to the beneficiary hereunder.

In case at any time the trustee herein named or any trustee hereafter appointed shall resign or otherwise become incapable of acting, a successor may be appointed by the [fol. 31] party of the first part herein, if she be living, and if not, a National Bank having a paid in capital and surplus of not less than One Million Dollars ($1,000,000.00) may be appointed by Marion K. Brown Elliott by an instrument in writing and upon the appointment of such successor, the trustee herein named will assign, transfer and make over all of the stocks, bonds, securities and property constituting the trust fund to such successor in trust.

The trustee herein agrees that it will from time to time upon request of the party of the first part herein, if she be living, and after her death to Marion K. Brown Elliott, furnish a written statement of the property and securities constituting said trust fund and of its other acts and doings as such trustee.

The trustee agrees to use its best judgment in the execution of this trust but shall not be liable for errors of judgment and only liable for wilful default or malfeasance.

The trustee shall receive as a compensation for its services hereunder a sum not to exceed two per cent of the annual gross income from the property constituting said trust,

which shall be payable out of the income arising from said trust fund.

In Witness Whereof, party of the first part has set her hand and seal and the party of the second part has caused this indenture to be signed and acknowledged by its President and its corporate seal to be hereto affixed, attested [fol. 32] by the signature of its secretary, in duplicate, the day and year first above written.

(Signed) Katherine H. Brown. (Seal.) The Denver National Bank of Denver, Colo. by J. C. Burger, Vice President. (Seal.)

Attest: C. L. Green, Secretary.

State of New York,
City and County of New York, ss:

I, E. Nora Gibbons, a Notary Public within and for the City and County of New York in the State aforesaid, do hereby certify that Katherine H. Brown, who is personally known to me to be the same person whose name is subscribed to the foregoing trust agreement, appeared before me this day in person and acknowledged that she signed, sealed and delivered said instrument of writing as and for her free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal this 30th day of December, A. D. 1924.

My commission expires March 30th, 1926.

(Signed) E. Nora Gibbons, Notary Public. (Seal.)

[fol. 33] State of Colorado,
City and County of Denver, ss:

I, Persifor M. Cooke, a Notary Public in and for said City and County, in the State aforesaid, do hereby certify that J. C. Berger, and C. L. Green, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument as having executed the same respectively as Vice President and Secretary of The Denver National Bank of Denver, Colorado, a national banking corporation, and who are known to me to be such officers respectively, appeared before me this day in person and severally acknowledged that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that the same was thereunto affixed by the authority of said corpora-

tion; that said instrument was by like authority subscribed with its corporate name; that the said J. C. Berger is the Vice-President of said corporation, and the said C. L. Green is the Secretary thereof; that by the authority of said corporation, they respectively subscribed their names thereto as Vice-President and Secretary, and that they signed, sealed and delivered the said instrument of writing as their free and voluntary act and deed, and as the free and voluntary act and deed of said corporation for the uses and purposes therein set forth.

Given under my hand and seal this 2nd day of January, A. D. 1925.

My commission expires August 2, 1927.

(Signed) Persifor M. Cooke, Notary Public. (Seal.)

[fol. 34] In Surrogates' Court, New York County

Affidavit of Frederick C. Bangs as to Assets of Estate

State of New York,
County of New York, ss:

Frederick C. Bangs, being duly sworn, deposes and says:

He is an attorney-at-law, representing the Executors of the Last Will and Testament of Katherine H. Brown, deceased, and is fully familiar with all procedure had in and the facts relating to the administration of said estate.

The said decedent on December 30th, 1924, while still a resident of and domiciled in Denver, Colorado, created a trust with the Denver National Bank of Colorado as Trustee. Under the terms of said deed of trust, the income was made payable at the rate of $1,000.00 a month to the settlor's daughter as long as said daughter should live. The purpose of the trust, as deponent understands and believes, was to provide an allowance or drawing account for the daughter.

In July, 1929, the daughter in the meantime having become somewhat involved financially, the settlor, with the consent of the daughter, notified the Denver National Bank as Trustee that until further orders they should credit the income from said trust to her (the settlor's) account instead of to the daughter's account. Later in September of the same year, the daughter's creditors having in the meantime

[fol. 35] agreed not to bring suits and press their claims, a Trustee for creditors was appointed and the settlor instructed the Trustee (Denver National Bank) to pay $500.00 a month from the trust income to the Trustee for creditors until all debts were paid in full. The other $500.00 was credited to the settlor's account and was used and credited by her in reduction of advances which she had made for the daughter's account. Such situation existed up to December 11th, 1931, the date when the settlor died, a resident of the State of New York.

The Trustee after the death of the settlor, being uncertain as to the status of the trust and of the person or persons to whom income should be paid, refused to pay out the income. A suit in equity was brought in the District Court of the City and County of Denver by the daughter and her children against the Trustee, also naming as respondents the Executors and Trustees named in the Will of the decedent and also the residuary legatee under said will, to have the status of the trust judicially determined. A copy of the Bill in Equity is annexed hereto, marked Exhibit "A" and made a part hereof.

Such Bill of Equity sets out in substance the facts hereinbefore recited and also alleges as follows:

Article III

* * * * * * *

"That said Katherine H. Brown did not during her lifetime change the beneficiaries or any of them of said trust in [fol. 36] the manner provided in said trust agreement, or in any manner whatsoever, or at all."

Article IV

* * * * * * *

"That the said Katherine H. Brown on the 25th day of July, D. A. 1929, and on July 26, 1929, with the knowledge and consent of your Petitioner, Marion K. Brown Elliott, directed and instructed the said Respondent, The Denver National Bank of Denver, Colorado, as trustee, to pay the income from said trust until further notice, to her, the said Katherine H. Brown.

That the sole purpose of diverting the income from said trust from Petitioner, Marion K. Brown Elliott, to Kathe-

rine H. Brown as aforesaid, was to reimburse the said Katherine H. Brown for money advanced and paid by her for the account of Petitioner, Marion K. Brown Elliott, and as Petitioners aver, was not a change of the beneficiary or beneficiaries or any of them of said trust.

That it was the purpose and intent of the said Katherine H. Brown that said income should be restored and paid to Marion K. Brown Elliott, the beneficiary of said trust, when said Katherine H. Brown should have been reimbursed from the income of said trust for moneys advanced and paid by her on account of Petitioner, Marion K. Brown Elliott.

That in order to pay certain indebtedness of your Petitioner, Marion K. Brown Elliott, then owing, the said Katherine H. Brown directed said Respondent, The Denver Na-
[fol. 37] tional Bank of Denver, Colorado, as trustee, on September 16, 1929, to pay one Edwin J. Wittelshofer, as trustee, the sum of $500.00 per month from the income of said trust until further notice.

That the indebtedness owing by Petitioner, Marion K. Brown Elliott, at that time has all been paid from money received by Edwin J. Wittelshofer, as such trustee, from said Respondent, The Denver National Bank of Denver, Colorado, with the exception of the sum of $500.00 which said sum the said Respondent, The Denver National Bank of Denver, Colorado, as trustee, refuses and declines to pay to Edwin J. Wittelshofer, as trustee, notwithstanding the instructions of Katherine H. Brown dated September 16, 1929.

Petitioners further aver that the instructions and directions of the said Katherine H. Brown to the Respondent, The Denver National Bank of Denver, Colorado, as trustee, as hereinabove set forth, to pay the income from said trust to Katherine H. Brown and to Edwin J. Wittelshofer, as trustee, terminated and ceased to be effective upon the death of the said Katherine H. Brown, except insofar as the instruction and direction to pay Edwin J. Wittelshofer, as trustee the sum of $500.00 per month from said income until final payment of the debts of Petitioner, Marion K. Brown Elliott, had been made as aforesaid, which said instruction and direction and the trust to Edwin J. Wittelshofer, as trustee, will terminate and come to an end when the purpose for which said trust to Edwin J. Wittelshofer was created has been fulfilled. That upon the death of said
[fol. 38] Katherine H. Brown your Petitioner, Marion K.

Brown Elliott, became and is entitled to the income from said trust in accordance with the terms and provisions thereof."

On June 23rd, 1932, the said proceedings in equity terminated by the entry of a decree of that date, a certified copy of which is annexed hereto, marked Exhibit "B" and made a part hereof. Said decree recites among other findings of fact that the Court found:

"* * * That the allegations of Petitioners' bill of complaint are and each of them is true, and that the Petitioners herein are entitled to relief as prayed in said bill.

And the Court doth further find: That said trust agreement executed by Katherine H. Brown, now deceased, to the Respondent, The Denver National Bank of Denver, Colorado, as Trustee, has not been revoked and is a valid and existing trust.

And the Court doth further find: That the Petitioners herein are entitled to receive from said Respondent, The Denver National Bank of Denver, Colorado, as Trustee, the income from said trust in accordance with the terms and provisions of said trust agreement."

Said decree ordered among other things the following:

"1. That The Denver National Bank of Denver, Colorado, as Trustee, shall pay Edwin J. Wittelshofer, as Trustee, from the accumulated income of the trust created by [fol. 39] Katherine H. Brown dated December 30, 1924, the sum of Five Hundred and no/100 ($500.00) Dollars.

3. That the said The Denver National Bank of Denver, Colorado, as Trustee, shall pay the proceeds of the accumulated income since the death of the said Katherine H. Brown to the date hereof to Marion K. Brown Elliott.

4. That The Denver National Bank of Denver, Colorado, as Trustee, shall execute and perform the provisions of said trust agreement executed by said Katherine H. Brown on December 30, 1924, and distribute the income accruing therefrom and the principal thereof in accordance with the terms and provisions of said trust agreement."

Deponent, therefore, states, in accordance with the findings and decree of said Colorado Court, that the settlor of said trust of December 30, 1924, did not during her lifetime revoke said trust nor change the income beneficiary

named in said trust instrument, and further alleges that at all times from the creation of said trust to the date of the death of the settlor and to the present time the daughter of said decedent has been such beneficiary and that all the income of said trust fund during the entire period has been paid or credited to the account of said daughter.

Frederick C. Bangs.

Sworn to before me this 29th day of May, 1934. Letitia H. Ketterer, Notary Public. N. Y. Co. Clk's No. 216, Reg. No. 6K307. Commission expires March 30th, 1936. (Notarial Seal.)

[fol. 40] EXHIBIT "A" ANNEXED TO AFFIDAVIT OF FREDERICK C. BANGS

STATE OF COLORADO,
City and County of Denver, ss:

IN THE DISTRICT COURT

No. —. Div. —

MARION K. BROWN ELLIOTT, and MARION ELLIOTT and NIXON ELLIOTT, Minors, by Marion K. Brown Elliott, Their Next Friend, Petitioners,

vs.

THE DENVER NATIONAL BANK OF DENVER, COLORADO, a National Banking Corporation, as Trustee; Horace F. Phelps, City Bank Farmers Trust Company, a Corporation, and The Colorado National Bank of Denver, a National Banking Corporation, as Executors and Trustees of the Last Will and Testament and of the Estate of Katherine H. Brown, Deceased; and The Children's Hospital Association of Denver, Colorado, a Corporation, Respondents

Bill in Equity to Construe Trust

Come now said Petitioners by their attorneys and respectfully represent and show:

I

That Petitioner Marion K. Brown Elliott is the daughter [fol. 41] of Katherine H. Brown, Deceased, hereinafter mentioned.

That Petitioners Marion Elliott and Nixon Elliott are the sole and only living children of Petitioner Marion K. Brown Elliott and are minors and without a legal guardian and join in this proceeding as Petitioners by Marion K. Brown Elliott, their next friend.

That the Respondent, The Denver National Bank of Denver, Colorado, is a corporation duly organized and existing under and by virtue of the national banking laws of the United States.

That the Respondent, City Bank Farmers Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

That the Respondent, The Colorado National Bank of Denver, is a corporation duly organized and existing under and by virtue of the national banking laws of the United States.

That said Respondents, Horace F. Phelps, City Bank Farmers Trust Company, and The Colorado National Bank of Denver, together with the Petitioner, Marion K. Brown Elliott (also known as Marion Brown Elliott), are the duly qualified and acting executors and trustees of the Last Will and Testament and of the Estate of Katherine H. Brown, Deceased.

That the Respondent, The Children's Hospital Association of Denver, Colorado, is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado.

That Katherine H. Brown departed this life on or about December 11, 1931, leaving a Last Will and Testament [fol. 42] heretofore duly admitted to probate and record on, to wit, the 11th day of January, A. D. 1932, by James A. Foley, Surrogate of the County of New York, State of New York.

That it is provided among other things in and by said Last Will and Testament that said executors and trustees, after the payment of certain bequests and annuities, shall upon the death of the survivor of the children of Marion Brown Elliott pay and distribute the principal of said estate to said The Children's Hospital Association of Denver, Colorado.

II

That said Katherine H. Brown, during her lifetime, made and entered into a certain agreement with The Denver National Bank of Denver, Colorado, by written indenture

(hereinafter called the "trust agreement"), dated the 30th day of December, A. D. 1924, wherein and whereby the said Katherine H. Brown granted, transferred, assigned, set over and conveyed to the said Respondent, The Denver National Bank of Denver, Colorado, certain personal property and securities in said trust agreement described, in trust upon certain terms, provisions and conditions set forth in said trust agreement.

That Paragraph Second of said trust agreement is in the words and figures following, to wit:

"To pay the income from said bonds, securities, and property in monthly instalments of One Thousand Dollars [fol. 43] ($1,000.00) each on the first of each and every month, to my daughter, Marion K. Brown Elliott, so long as she shall live, provided that should the income from said bonds, stocks and securities be not sufficient to pay the monthly instalment herein set forth, said instalment shall be proportionately reduced, and in the event said income exceeds the monthly instalments herein mentioned, the excess thereof shall be added to the instalment of income due and payable on January 1st of each year."

That Paragraph Third of said trust agreement is in the words and figures following, to wit:

"To pay the income arising from said property after the death of my said daughter, Marion K. Brown Elliott, unto her children then living, share and share alike, until such children or any of them attain the age of twenty-five years, at which time an equal proportionate share of the principal of the fund hereby created shall be paid to such child. In the event that no such child or children of my said daughter survive her, then said stocks, bonds and property shall revert to and become part of my estate and be distributed in accordance with the terms and provisions of my last will and testament."

That the trust created by said agreement is upon certain express conditions, among which are the following:

(a) That said Katherine H. Brown reserved the right at any time, upon ten (10) days' written notice to the trustee [fol. 44] to change the beneficiary, or any of them, without the consent of said beneficiary.

(b) That said Katherine H. Brown retained the power to revest in herself title to the corpus of said trust and upon ten (10) days' written notice to said trustee or any successor revoke said trust, and terminate the same without notice to any beneficiary thereunder.

The said Respondent, The Denver National Bank of Denver, Colorado, as trustee, by said indenture accepted said trust and agreed to execute the same in accordance with the terms and conditions therein set forth.

That thereupon the personal property and securities described in said trust agreement were delivered by said Katherine H. Brown to said Respondent, The Denver National Bank of Denver, Colorado, as trustee, and from and since said date said Respondent, The Denver National Bank of Denver, Colorado, became and now is vested with the legal title to the personal property and securities constituting the trust fund as trustee and said trust became and is now in full force and effect.

III

That said Katherine H. Brown during her lifetime did not at any time revest in herself title to the corpus of said trust or revoke said trust in the manner provided in said trust agreement, or in any manner whatsoever or at all, and the said The Denver National Bank of Denver, Colo- [fol. 45] rado, as trustee, did not at any time after the execution of said trust agreement and delivery to it of said personal property and securities constituting said trust fund assign, transfer, make over and deliver to said Katherine H. Brown any of said personal property or securities but continues to hold and retain the same subject to all of the terms and provisions of said trust agreement.

That said Katherine H. Brown did not during her lifetime change the beneficiaries or any of them of said trust in the manner provided in said trust agreement, or in any manner whatsoever or at all.

IV

Petitioners further aver that from the date when said trust was created, Marion K. Brown Elliott, one of the Petitioners herein and a beneficiary of said trust, received the income therefrom at the times and in the manner provided in said trust agreement until the 1st day of August, A. D. 1929.

That the said Katherine H. Brown on the 25th day of July A. D. 1929, and on July 26, 1929, with the knowledge and consent of your Petitioner, Marion K. Brown Elliott, directed and instructed the said Respondent, The Denver National Bank of Denver, Colorado, as trustee, to pay the income from said trust, until further notice, to her, the said Katherine H. Brown.

That the sole purpose of diverting the income from said trust from Petitioner, Marion K. Brown Elliott, to Kath-
[fol. 46] erine H. Brown as aforesaid, was to reimburse the said Katherine H. Brown for money advanced and paid by her for the account of Petitioner, Marion K. Brown Elliott, and as Petitioners aver, was not a change of the beneficiary or beneficiaries, or any of them, of said trust.

That it was the purpose and intent of the said Katherine H. Brown that said income should be restored and paid to Marion K. Brown Elliott, the beneficiary of said trust, when said Katherine H. Brown should have been reimbursed from the income of said trust for moneys advanced and paid by her on account of Petitioner, Marion K. Brown Elliott.

That in order to pay certain indebtedness of your Petitioner, Marion K. Brown Elliott, then owing, the said Katherine H. Brown directed said Respondent, The Denver National Bank of Denver, Colorado, as trustee, on September 16, 1929, to pay one Edwin J. Wittelshofer, as trustee, the sum of $500.00 per month from the income of said trust until further notice.

That the indebtedness owing by Petitioner, Marion K. Brown Elliott at that time has all been paid from money received by Edwin J. Wittelshofer, as such trustee, from said Respondent, The Denver National Bank of Denver, Colorado, with the exception of the sum of $500.00 which said sum the said Respondent, The Denver National Bank of Denver, Colorado, as trustee, refuses and declines to pay to Edwin J. Wittelshofer, as trustee, notwithstanding the instructions of Katherine H. Brown dated September 16, 1929.

[fol. 47] Petitioners further aver that the instructions and directions of the said Katherine H. Brown to the Respondent, The Denver National Bank of Denver, Colorado, as trustee, as hereinabove set forth, to pay the income from said trust to Katherine H. Brown and to Edwin J. Wittelshofer, as trustee, terminated and ceased to be effective upon the death of the said Katherine H. Brown, except insofar as

the instruction and direction to pay Edwin J. Wittelshofer, as trustee, the sum of $500.00 per month from said income until final payment of the debts of Petitioner, Marion K. Brown Elliott, had been made as aforesaid, which said instruction and direction and the trust to Edwin J. Wittelshofer, as trustee, will terminate and come to an end when the purpose for which said trust to Edwin J. Wittelshofer was created has been fulfilled. That upon the death of said Katherine H. Brown your Petitioner, Marion K. Brown Elliott, became and is entitled to the income from said trust in accordance with the terms and provisions thereof.

Petitioners further aver that said Respondent, The Denver National Bank of Denver, Colorado, as trustee, declines and refuses to pay Petitioner, Marion K. Brown Elliott, as beneficiary of said trust, the income therefrom when due and payable according to the terms and provisions of said trust since the death of the said Katherine H. Brown on December 11, 1931, unless and until instructed and ordered so to do by a court of competent jurisdiction.

Petitioners further aver that the interest of the said The Children's Hospital Association of Denver, Colorado, in [fol. 48] and to the subject-matter of this action, if any, arises by reason of the provisions of the Last Will and Testament of Katherine H. Brown, deceased, hereinabove set forth, whereby said Respondent, The Children's Hospital Association of Denver, Colorado, is the ultimate beneficiary of the residue of the estate of Katherine H. Brown, deceased, and by reason of the contingency contained in Paragraph Third of said trust agreement hereinabove set forth whereby, in the event said Petitioner, Marion K. Brown Elliott, shall not be survived by any child or children, the said trust fund shall revert to and become part of the estate of Katherine H. Brown and distributed in accordance with the terms of her said Last Will and Testament.

Petitioners further aver that by reason of the matters and things aforesaid they seek the aid of this Court in the premises as a Court having general equity jurisdiction.

Wherefore, Petitioners pray that a decree be entered herein construing said trust and instructing and directing the Respondent, The Denver National Bank of Denver, Colorado, as trustee, to pay the income therefrom to Petitioners herein as in said trust agreement provided, with the exception of $500.00 to be paid to Edwin J. Wittelshofer, as trustee, from such income, and to execute and carry out

the terms and provisions of said trust agreement as therein provided, and for such other and further relief in the premises as shall be meet and proper and in equity with good conscience.

——, Attorney for Petitioners.

[fol. 49] State of New York,
County of New York, ss:

Marion K. Brown Elliott, of lawful age, being first duly sworn, upon oath deposes and says:

That she is one of the Petitioners named in the above-entitled action; that she has read the foregoing instrument and knows the contents thereof; and that the same is true.

——.

Subscribed and sworn to before me this — day of ——, A. D. 1932. John J. Tierney, Notary Public, Kings County, New York. Clerk's No. 7, Register's No. 4006. Certificate filed in New York County. Clerk's No. 20, Register's No. 4-1-15. My commission expires ——, ——.

[fol. 50] Exhibit "B" Annexed to Affidavit of Frederick C. Bangs

District Court, City and County of Denver, Second Judicial District

State of Colorado,
City and County of Denver, ss:

Pleas in the District Court of the City and County of Denver, State of Colorado, in the First Division thereof, before the Hon. Henley A. Calvert, one of the Judges of the Second Judicial District of the said State, at a term thereof begun and held at the Court House in Denver, in said county, on the second Tuesday (it being the 12th day) of April, A. D. One Thousand Nine Hundred Thirty-two.

Present:

Honorable Henley A. Calvert, one of the Judges of the District Court.

Earl Wettengel, Esq., District Attorney of said District.
Carl S. Milliken, Esq., Manager of Safety and Excise and Ex-officio Sheriff of said County.
F. D. Stackhouse, Esq., Clerk of said Court.

[fol. 51] STATE OF COLORADO,
City and County of Denver, ss:

IN THE DISTRICT COURT

No. A 3471. Div. 1

Filed in District Court, City & County of Denver, Colo., June 23, 1932.

F. D. Stackhouse, Clerk.

MARION K. BROWN ELLIOTT, and MARION ELLIOTT and NIXON ELLIOTT, Minors, by Marion K. Brown Elliott, Their Next Friend, Petitioners,

vs.

THE DENVER NATIONAL BANK OF DENVER, COLORADO, a National Banking Corporation, as Trustee; Horace F. Phelps, City Bank Farmers Trust Company, a Corporation, and The Colorado National Bank of Denver, a National Banking Corporation, as Executors and Trustees of the Last Will and Testament and of the Estate of Katherine H. Brown, Deceased; and The Children's Hospital Association of Denver, Colorado, a Corporation, Respondents

Decree

This cause having been regularly set for final hearing and determination on the 21st day of June, 1932, the said Peti-
[fol. 52] tioners appearing by James D. Benedict, one of their attorneys; the said Respondents, Horace F. Phelps, City Bank Farmers Trust Company, and The Colorado National Bank of Denver, as Executors and Trustees of the Last Will and Testament and of the Estate of Katherine H. Brown, Deceased, having entered their appearance herein and consented to the entry of final judgment and decree in accordance with the prayer of Petitioners' complaint; and The Denver National Bank of Denver, Colorado, as Trustee, having filed its separate answer herein and appearing by Irving Hale, Jr., one of its attorneys; and The Children's Hospital Association of Denver, Colorado, hav-

ing filed its separate answer herein and appearing by James L. Goree, one of its attorneys;

Thereupon said cause coming on for trial and final determination and upon the evidence and proof to the Court adduced, and the Court having heard said evidence and duly considered the same, and having considered the pleadings herein and the matters therein set forth and the arguments of counsel, and being now fully advised in the premises,

Doth find: That the allegations of Petitioners' bill of complaint are and each of them is true, and that the Petitioners herein are entitled to relief as prayed in said bill.

And the Court doth further find: That said trust agreement executed by Katherine H. Brown, now deceased, to the Respondent, The Denver National Bank of Denver, Colo- [fol. 53] rado, as Trustee, has not been revoked and is a valid and existing trust.

And the Court doth further find: That the Petitioners herein are entitled to receive from said Respondent, The Denver National Bank of Denver, Colorado, as Trustee, the income from said trust in accordance with the terms and provisions of said trust agreement and that the Respondents, Horace F. Phelps, City Bank Farmers Trust Company, and The Colorado National Bank of Denver, as Executors and Trustees of the Last Wil- and Testament and of the Estate of Katherine H. Brown, Deceased, and the Respondent, The Children's Hospital Association of Denver, Colorado, have no right, title, claim or interest in or to said income or the property held in trust by the Respondent, The Denver National Bank of Denver, Colorado, as Trustee, except insofar as such interest may arise in accordance with the terms and provisions of said trust agreement.

The Court doth further find: That Edwin J. Wittelshofer, as Trustee, is entitled to receive the sum of Five Hundred and no/100 ($500.00) Dollars from the income of said trust in final settlement of the trust heretofore created out of said income by said Katherine H. Brown during her lifetime, and that upon the payment of said sum of Five Hundred and no/100 ($500.00) Dollars to said Edwin J. Wittelshofer, as Trustee, the object and purpose of such trust to said Edwin J. Wittelshofer, as Trustee, shall have been fully and completely satisfied and terminated.

[fol. 54] Wherefore, it is ordered, adjudged and decreed:

1. That The Denver National Bank of Denver, Colorado, as Trustee, shall pay Edwin J. Wittelshofer, as Trustee, from the accumulated income of the trust created by Katherine H. Brown dated December 30, 1924, the sum of Five Hundred and no/100 ($500.00) Dollars.

2. That The Denver National Bank of Denver, Colorado, as Trustee, out of the accumulated income in its hands shall retain the sum of Three Hundred Seventy-five and no/100 ($375.00) Dollars for its expenses and attorney fees herein incurred.

3. That the said The Denver National Bank of Denver, Colorado, as Trustee, shall pay the proceeds of the accumulated income since the death of the said Katherine H. Brown to the date hereof to Marion K. Brown Elliott.

4. That The Denver National Bank of Denver, Colorado, as Trustee, shall execute and perform the provisions of said trust agreement executed by said Katherine H. Brown on December 30, 1924, and distribute the income accruing therefrom and the principal thereof in accordance with the terms and provisions of said trust agreement.

5. That the Respondents, Horace F. Phelps, City Bank Farmers Trust Company, and The Colorado National Bank of Denver, as Executors and Trustees of the Last Will and Testament and of the Estate of Katherine H. Brown, Deceased, and the Respondent, The Children's Hospital Asso-[fol. 55] ciation of Denver, Colorado, have no right, title, claim or interest in or to the income from said trust or the property constituting said trust, except as the same may arise in the execution and performance of the terms and provisions of said trust by said The Denver National Bank of Denver, Colorado, as Trustee.

6. And it is further ordered, adjudged and decreed: That this Court retain jurisdiction of this cause for hearing and determination of such matters pertaining to the execution and performance of the terms and provisions of said trust agreement, or any matter in connection therewith and the rights and interests of the parties affected thereby, as shall be necessary and proper.

Done in open Court at Denver, Colorado, this 23 day of June, A. D. 1932.

By the Court:

Henley A. Calvert, Judge.

Approved: Lewis & Grant, Irving Hale, Jr.

Approved as to form: Hodges, Wilson & Rogers, James L. Goree.

I, F. D. Stackhouse, Clerk of the District Court of the City and County of Denver, State aforesaid, do hereby cer-
[fol. 56] tify the above and foregoing to be a true, complete and perfect transcript and copy of Decree had and entered of record in a certain cause in said Court lately depending wherein Marion K. Brown Elliott, et al., were Plaintiffs, The Denver National Bank of Denver, Colorado, and etc., et al., were Defendants, as the same now remains on file and of record in this office.

Witness F. D. Stackhouse, Clerk of said Court, with the seal thereof hereunto affixed at his office, in the City and County of Denver, State of Colorado, this 24th day of May, A. D. 1934.

(Signed) F. D. Stackhouse, Clerk., by (Signed) John B. Goodman, Jr., Deputy Clerk. (Seal District Court, Second Judicial District, City and County of Denver, Colorado.

[fol. 57] In Surrogates' Court, County of New York

JS:SN.

Report of Appraiser

To the Surrogates' Court of the County of New York:

I, Jacob Manicoff, Succeeding Maurice A. Stephenson, Estate Tax Appraiser, who had been designated by Hon. James A. Delehanty, Surrogate of the County of New York, by an order duly made and entered on the 26 day of January, 1933, to appraise the estate of the above-named decedent, pursuant to the provisions of the Law imposing a tax on estate of residents and nonresidents, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 249-v of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held

an appraisal on the 26 day of July, 1933, at the Office of the Estate Tax Appraiser for the County of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same, and having given due consideration to the affidavits and other papers submitted herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

[fol. 58] First. I report that the decedent herein died a resident of the State of New York on the 11 day of December, 1931, leaving a Last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by this Court on the — day of ——, 19–, and that thereafter on the 11 day of January, 1932, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to

City Bank Farmers Trust Company, 22 William Street, New York City,
Marion Brown Elliott, Rye, Westchester County, New York,
Colorado National Bank, Denver Colorado,
Horace F. Phelps, Denver, Colorado,

as Executors.

Second. I further report the following appearances in this proceeding:

Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York City.

Towsley & Bangs, Esqs., Attorneys for Executors, 122 East 42nd Street, New York City.

Third. I further report that I found the property comprising the gross estate of the decedent herein to consist of the items set forth in the annexed affidavit for appraisal, and that the fair market value of each of the said items at the date of decedent's death is the amount set down by me [fol. 59] opposite such item in the column designated "Value as appraised in this proceeding," and that the sums properly to be allowed as deductions herein for the purpose of determining the net estate are the amounts set down by me after the several items claimed in the column designated "Allowed in this proceeding," as a result of

which I find the said gross estate and deductions to be as shown in the following summary:

Assets.		
Schedule A—Real Estate		$220,137.50
Schedule B—Stocks and Bonds		774,212.26
Schedule C—Mortgages, Notes, Cash and Insurance		74,353.58
Schedule D-1—Jointly Owned Property		0
Schedule D-2—Other Miscellaneous Property		31,307.94
Schedule E—Transfers		265,767.03
Schedule F—Powers of Appointment		0
Schedule G-1—Property Identified as Previously Taxed		0
Gross Estate		$1,365,778.31
Subject to Deductions as follows:		
Schedule G-2—Property Identified as Previously Taxed	$ 0	
Schedule H—Funeral and Administration Expenses	$112,134.70	
Schedule I—Debts	26,371.90	
Schedule J—Mortgages, Net Losses, and Support of Dependents	55,385.00	
Schedule K—Charitable, Public, and Similar Gifts and Bequests	120,515.68	
Total deductions		$314,407.28
The net estate, I appraise at		$1,051,371.03

[fol. 60] Fourth. I further report that the decedent died a non-resident of this State and that the total valuation of real propery situated and tangible personal property having an actual situs within this State is $—.

(This paragraph applies only if the decedent was in fact a non-resident as shown in paragraph 1.)

Fifth. I further report the amount of exemptions allowed under § 249-q to be:

Beneficiaries		Relationship	Amount of exemption $
Marion Brown Elliott		Daughter	
Legacy	$250,000.00		
Specific bequest of personalty	30,291.00		
Life estate, payable quarterly, in residuary estate $619,328.68 Present Value	315,109.00		
Life estate, payable monthly, in property under Trust Agreement, dated Dec. 30, 1924, appraised at $265,767.03 Present Value	182,388.00		
	777,788.00		5,000.00
Nixon Elliott, Jr.		Grandson	
Surviving life estate in 1/2 residuary estate $309,664.34; Present Value	40,964.00		5,000.00
Marion Brown Elliott		Granddaughter	
Surviving life estate in 1/2 residuary estate $309,664.34; Present value	39,721.00		5,000.00

[fol. 61]

Beneficiaries		Relationship	Amount of exemption
Nina McClure		Sister	
Legacy	2,500.00		
Annuity of $5,000.00, payable monthly; Present Value	78,748.00		
	81,248.00		5,000.00
Marion McClure		Niece	
Legacy	500.00		
Surviving annuity of $1,200.00, payable monthly, to begin on death of Nina McClure; Present Value	6,201.00		
	6,701.00		0
George McClure		Nephew	
Legacy	500.00		0
William McClure		Nephew	
Legacy	500.00		0
Robert McClure		Nephew	
Legacy	500.00		0
Mae Brown		No Relation	
Legacy	1,000.00		0
Annuity of $1,200.00, payable monthly; Present Value	18,070.00		
	19,070.00		
Gertrude Leiendecker		No Relation	
Legacy	1,000.00		0
To the Executors:			
Remainder after life estate to Marion Brown Elliott	83,379.03		0
Insurance			0.00
Total Exemptions			$20,000.00

Respectfully submitted, Jacob Manicoff, Appraiser.

Dated: New York, N. Y., Nov. 27, 1933.

[fol. 62] In Surrogates' Court, County of New York

Present: Hon. James A. Foley, Surrogate.

P21-1932

In the Matter of the Appraisal of the Estate of Katherine H. Brown, Deceased

Order Assessing Tax—November 28, 1933

On reading the report filed the 27th day of November, 1933, of Jacob Manicoff, Esquire, the appraiser appointed by order of this Court, dated the 26th day of January, 1933,

and it appea ing that the said decedent died on the 11th day of December, 1931, it is

Ordered And Adjudged that the market value of the gross estate of said decedent at the time of death, the amount of exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable, shall be and the same hereby is assessed, fixed and determined as follows:

[fol. 63] Gross Estate	$1,365,778.31
Total deductions allowed by statute	314,407.28
Net Estate	$1,051,371.03
Tax on net estate not in excess of $150,000 less $20,000 exemptions allowed under Section 249-q	1,040.
Tax on net estate in excess of $150,000	35,676.78
Total tax	$36,716.78

J. A. F., Surrogate.

[fol. 64] In Surrogate's Court, County of New York

Notice of Appeal to Surrogate

Please Take Notice that Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company and Colorado National Bank, as Executors of the Last Will and Testament of Katherine H. Brown, deceased, hereby appeal to the Surrogate of the County of New York from the order and determination of said Surrogate heretofore entered herein on the 28th day of November, 1933, upon the report of the Appraiser in the above entitled matter fixing the tax upon the estate of decedent, and that the grounds of such appeal are as follows:

1. Under Article 10 C of the Tax Law of the State of New York properly interpreted no part of and no interest in the securities and other property comprising a certain trust fund held by the Denver National Bank of Denver, Colorado, as Trustee, included in the Appraiser's Report as

a part of the gross estate of the decedent and erroneously taxed by the taxing order appealed from, constitute property of the decedent located or situated in the State of New York and/or subject to tax in this State as a part of the estate of said decedent. Said trust fund was established with the Denver National Bank by the decedent's Deed of Trust dated December 30, 1924, while she was a resident of the State of Colorado. The title to the trust property [fol. 65] was then transferred to said Bank and has ever since been vested exclusively in said Bank as Trustee; and said trust property has been at all times since said date and at the death of the decedent was and now is located, situated and held in said State subject to the control of and protected by the laws of said State and taxed for inheritance tax purposes by the said State of Colorado as having acquired a business and permanent actual situs within said State.

2. If under Article 10 C of the said Tax Law properly interpreted and applied, the securities and other property comprising said trust fund or any part thereof or any interest therein are held to constitute property of the decedent located or situated in the State of New York and/or subject to tax therein as a part of decedent's estate, said Article as so interpreted and applied is unconstitutional, null and void as in violation of the due process clause of the Constitution of the State of New York and of the due process clause embraced in the Fourteenth Amendment of the Constitution of the United States.

3. Said taxing order appealed from insofar as it includes or attempts to include in the gross estate of decedent for New York estate tax purposes all or any part of the securities and other property comprising at the date of death of decedent the said trust fund or any interest therein, is without authority of law, constitutes an attempt to assess a tax upon the transfer of property wholly without the jurisdiction of the State of New York; and said taxing order and said Article 10 C of the Tax Law if interpreted and [fol. 66] applied as authorizing the same are unconstitutional, null and void as in violation of the Constitution of the State of New York and of the Constitution of the United States, and particularly the due process clauses embraced within said Constitutions and amendments thereto.

4. If it be held that the transfer of the securities and other property comprising the said trust fund or some part thereof or some interest therein is subject to tax under Article 10 C of the Tax Law of the State of New York, the taxing order appealed from is erroneous in that it fails to contain a provision to the effect that the executors shall not be liable for the payment of the tax on that part of the estate which has not and except for the possible happening of a remote contingency will never come into their hands or under their control or under the jurisdiction or control of the Surrogate, but will remain within the State of Colorado to be held, managed, invested, controlled, protected and distributed under the laws of that State and under the provisions of said Deed of Trust dated December 30, 1924.

5. If it be held that the transfer of the securities and other property comprising said trust fund or some part thereof or some interest therein is subject to tax under Article 10 C of the Tax Law and if it be further held that the taxing order appealed from is not erroneous in that it fails to contain a provision to the effect that the executors shall not be liable for the payment of such tax, said order is erroneous because it improperly fails to allow against the tax assessed upon [fol. 67] the transfer of said trust fund, a credit as required by Section 249-O of the Tax Law in the amount of $7,144.72, representing the proportionate part of the total tax imposed by Section 249-N of the Tax Law upon the entire net estate of decedent which the value of said trust fund bears to the value of the entire gross estate of decedent, on account of the constitutionally valid inheritance tax upon the transfer of said identical property assessed by and paid to the State of Colorado in the amount of $15,653.82.

6. Said taxing order is erroneous in that it includes in the gross estate of decedent property and/or interest in property wholly without the jurisdiction of the State of New York and of this Court and thereby so interprets and applies Article 10 C of the Tax Law as to require the Surrogate under Section 124 of the Decedent Estate Law to pro-rate the New York estate tax and the Federal estate tax against persons, property and interests wholly without the jurisdiction and control of the State of New York and of the Surrogate—a thing which under the laws and Constitution of this State and of the United States cannot

be effectively or legally done, thereby necessarily involving an application of Section 124 of the Decedent Estate Law which renders it unconstitutional, null and void. Even if the credit provided by Section 249-O of the Tax Law referred to in number 5 above were allowed and even if the Executors were relieved from liability for the payment of the tax on the transfer of said trust fund as referred to in [fol. 68] number 4 above, still if said trust fund were included in the gross estate of decedent the Surrogate would still be required under Section 124 of the Decedent Estate Law to prorate a part of the Federal estate tax against persons, property and interests wholly without the jurisdiction and control of the State of New York and said Surrogate, thereby still involving an application of Section 124 of the Decedent Estate Law which renders it as so applied, unconstitutional, null and void.

7. The taxing order appealed from is erroneous insofar as it follows the report of the Appraiser and taxes to the Executors of the Last Will and Testament of this decedent, the remainder interest of the said Denver trust fund which under the provisions of said Deed of Trust is vested in the grandchildren of the decedent and will become a part of the estate of the decedent only in the event that no grandchild of the decedent shall survive the decedent's daughter.

8. And generally, said taxing order insofar as it includes or attempts to include the securities and property comprising said trust fund or any part thereof or any interest therein as part of the gross estate of the decedent in New York for New York estate tax purposes and/or assesses or attempts to assess a tax on the transfer thereof based upon such inclusion, is without authority or justification in law, is invalid, void and of no effect, and the tax assessed or attempted to be assessed thereby is erroneous, arbitrary, unjust and illegal and said order and any and all statutory [fol. 69] or other provisions of law which authorize or attempt to authorize or justify the entry of such order and the assessment of such tax, are illegal, null and void and in violation of the rights of the Executors herein under the Constitution of the State of New York and of the United States and particularly under the due process clauses contained in Article 1, Section 6 of the New York Constitution

and in the Fourteenth Amendment to the Constitution of the United States.

Yours, etc., Towsley & Bangs, Attorneys for Appellants, Office & P. O. Address, 122 East 42nd Street, New York, N. Y.

To: Clerk of Surrogate Court. Attorney for State Tax Commission.

[fol. 70] In Surrogates' Court, New York County

Opinion of Surrogate Foley

New York Law Journal, Aug. 23, 1934

Estate of Katherine H. Brown

This is an appeal from the pro forma order fixing the estate tax and made on November 28, 1933. The appeal is taken by the executors from that specific part of the order which imposed a tax upon the succession to a trust fund established on December 30, 1924, by the decedent, who at that time was a resident of the State of Colorado. The trustee was a bank in that state. The fund consisted of bonds of the face value of $243,000. The market value as fixed by the appraiser at the time of death was somewhat in excess of that figure. Mrs. Brown died on December 11, 1931. Prior to her death she had changed her domicile from the State of Colorado to the State of New York. Under the deed the income of the trust was to be paid to the settlor's daughter for life and the settlor reserved the right to change the beneficiary. The trust agreement also reserved the full and complete power of revocation. This power was never exercised and no change was made in the trust except that from August 1, 1929, to the death of the decedent the trust income was paid in part to the decedent to reimburse her for advances made to her daughter, and in part to a trustee for creditors of the daughter to be applied to the payment of her debts.

The terms of the trust agreement provided that the daughter continue as life tenant after the death of her [fol. 71] mother. The remainder is contingent and the presumptive remaindermen are the two children of the daughter. At the time of the death of the decedent the securities remained with the trustee in Colorado.

The State of Colorado has taxed the succession to the fund. If the pro forma order is sustained, the State of New York will assess a second tax upon the succession to the same fund.

The principal contentions of the executors are that the order appealed from was made in violation of the state and federal constitution and that the state may not subject to taxation property wholly beyond her jurisdiction or control. The appeal is denied.

The succession would unquestionably be taxable in New York in the case of a trust deed made by a resident of this state, which reserved a power of revocation and appointed a New York trustee (Matter of Dana Co., 215 N. Y., 461; Matter of Bostwick, 160 N. Y. 489; section 249r Tax Law).

To declare the present taxing statute unconstitutional, or even to change the existing rule as to the taxable situs of property, by a court of first instance, in the absence of cogent reason or pertinent judicial authority, would inevitably lead to uncertainty in the administration of the Tax Law and possible loss of revenue to the state. The peril of such a determination was demonstrated by the subsequent reversal of a determination of unconstitutionality by courts of first instance in Matter of Watson (226 N. Y. 384; 227 N. Y. 584; 254 U. S. 112), and Matter of Cole (237 App. [fol. 72] Div. 372, aff'd 263 N. Y. 129). The existence of a power of revocation in the trust deed in the present case distinguishes the facts here from those in MacClurkan v. Bugbee (150 Atl. Reporter, 443). There no power of revocation existed; here there was a complete power to revoke. There the trust was established by a resident of Illinois. She subsequently became a resident of the State of New Jersey, where the question of taxation was determined in the decision just cited. The trustee was a resident of Illinois and the securities were located in that state at the time of the decedent's death. The court in effect held that the property, in part, passed subject to no privilege or right of testamentary or intestate succession granted by the law of New Jersey. The transfer to the life tenant of the trust, a resident of Illinois, was held to be exempt from taxation. Since there was no disposition of the remainder interest under the trust deed and that interest passed as part of the estate of the New Jersey decedent, it was held that a tax might properly be levied upon the succession to the remainder interest.

The decision of the United States Supreme Court in Safe Deposit & Trust Co. v. Virginia (280 U. S. 83), does not appear to apply to the facts here. That case did not involve an inheritance tax, but a direct assessment by the Virginia taxing authorities upon property located in the State of Maryland within a trust established by a decedent in his lifetime. The property was held to be taxable in Maryland, but not in Virginia.

In the present appeal the existence of a power of revoca-
[fol. 73] tion by which the creator—a resident of this state—retained the full power to revoke the trust and to regain control constituted, under our Tax Law (sec. 249r), the basis of a taxable succession (Bullen v. Wisconsin, 240 U. S. 625; Porter v. Commissioner of Internal Revenue, 288 U. S. 436; Matter of Dana Co., supra). It was stated by Chief Judge Bartlett in the latter case: "There was no element of finality about the instrument during the donor's lifetime, for it was just as capable of revocation as a will would have been. Under these circumstances, it was a transfer of a testamentary nature * * *."

The effect of my decision necessarily subjects the succession to the property to double taxation in Colorado and New York. To avoid that hardship would be desirable. However, until the Court of Appeals changes in its application to foreign trusts, the rule laid down in Matter of Dana Co. (supra) it would appear that the assessment of the tax should be upheld.

Submit order on notice denying the appeal from the pro forma order.

[fol. 74] In Surrogates' Court, County of New York

Stipulation as to Omissions From Printed Record

It Is Stipulated And Agreed that the following papers and parts of papers which constitute a part of the record in the Estate Tax Proceeding on file in the Office of the Surrogate's Court, New York County, the contents of which are not relevant to any of the questions raised by the appeal

herein, be not printed as a part of the Record on Appeal and the printing thereof is hereby dispensed with, namely:

Petition for Designation of Appraiser.
Order Designating Appraiser.
Estate Tax Return and Schedules, except Schedules E & J.
Affidavits of Appraisal.

Dated, New York, August 28, 1935.
Frederick C. Bangs, Attorney for Appellants. Edgar Hirschberg, Attorney for Respondent.

[fol. 75] In Surrogates' Court, County of New York

Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notices of appeal, the order appealed from, the opinion and of all relevant papers used before the Court below, on the hearing of the appeal to the Surrogate from the pro forma order, now on file in the office of the Clerk of the Surrogates' Court, County of New York. Certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, August 28, 1935.
Frederick C. Bangs, Attorney for Appellants. Edgar Hirschberg, Attorney for Respondent.

[fol. 76] In Surrogates' Court, County of New York

P21—1932

In the Matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased

Notice of Appeal to Court of Appeals

Sirs:

Please Take Notice that Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, deceased,

hereby appeal to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, First Department, entered in the Office of the Clerk of said Court on the 23rd day of June, 1936, affirming an order of the Surrogate's Court of the County of New York in the above entitled proceeding, entered in the Office of the Clerk of said Court on the 26th day of November, 1934, which denied the appeal from and affirmed the pro forma order and determination of the Surrogate, entered in the Office of the Clerk of said Court on the 28th day of November, 1933, fixing the estate tax upon the estate of said decedent, and said Executors further appeal from an order of the Surrogate's Court, County of New York, [fol. 77] entered upon said order of affirmance in the Office of the Clerk of said Court on the 28th day of October, 1936, and from each and every part of said order of affirmance.

Dated, December 7th, 1936.

Frederick C. Bangs, Attorney for Appellants, Office & Post Office Address, 36 West 44th Street, Borough of Manhattan, New York City.

To: Edgar Hirschberg, Esq.,
Attorney for Respondent,
80 Centre Street,
New York City. Clerk of Surrogate's Court, New York County.

[fol. 78] In Surrogate's Court, New York County

[Title omitted]

Stipulation Waving Security

It Is Hereby Stipulated And Agreed by and between the attorneys for the respective parties hereto that the undertaking which the Appellants are required to give to perfect their appeal to the Court of Appeals pursuant to Section 593 of the Civil Practice Act, except where the Appellate Division or a Judge of the Court of Appeals shall certify that a constitutional question is involved, is hereby waived pursuant to the provisions of Section 569 of the Civil Practice Act.

Frederick C. Bangs, Attorney for Executors-Appellants. Edgar Hirschberg, Attorney for Respondent.

[fol. 79] In Supreme Court of New York, Appellate Division

2626

In the Matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased

Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, deceased, Applts.,

The State Tax Commission, Respt.

Order of Affirmance on Appeal from Surrogate—June 23, 1936

An appeal having been taken to this Court by Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company and the Colorado National Bank of Denver, as [fol. 80] Executors, etc., from an order of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 26th day of November, 1934, denying an appeal and affirming the pro forma order entered November 28th, 1933, fixing the estate tax upon the estate of said decedent, and said appeal having been argued by Mr. Frederick C. Bangs of counsel for the appellants, and by Mr. Seth T. Cole of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order so appealed from be and the same is hereby affirmed with costs.

Appellate Division of the Supreme Court, First Judicial Department

Clerk's Office

County of New York:

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order

made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 23rd day of June, 1936.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 20th day of November, 1936.

George T. Campbell, Clerk. (Seal.)

[fol. 81] IN SURROGATE'S COURT, COUNTY OF NEW YORK

Present: Hon. James A. Foley, Surrogate.

P. 21-1932

In the Matter of the Estate Tax upon the Estate of KATHERINE H. BROWN, Deceased

ORDER ON REMITTITUR—October 28, 1936

Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company and the Colorado National Bank of Denver, as executors of the Last Will and Testament of Katherine H. Brown, deceased, having appealed to the Appellate Division of the Supreme Court of the State of New York for the First Department from the order of the Surrogate's Court entered herein on the 26th day of November, 1934, which said order denied the appeal from and affirmed the pro forma order and determination of the Surrogate entered in the office of the Clerk of said Court on the 28th day of November, 1933, fixing the estate tax upon the estate of the decedent and the said appeal having been duly argued in the said Appellate Division of the Supreme Court of the State of New York, and after due deliberation the said Appellate Division of the Supreme Court of the State of New York having directed that the order so appealed from be affirmed with costs and disbursements, and [fol. 82] having remitted the proceedings herein to this Court to be proceeded upon according to law,

Now, upon reading and filing the remittitur from the Appellate Division of the Supreme Court of the State of New York for the First Department and upon motion of Edgar Hirschberg, attorney for the respondent, it is

Ordered that the said order of the Appellate Division of the Supreme Court of the State of New York be and the same is made the order of this Court; and it is

Further Ordered that pursuant to the aforesaid order, the State Tax Commission of the State of New York recover from the estate of Katherine H. Brown, deceased, the sum of $94.00 costs and disbursements as taxed.

James A. Foley, Surrogate.

[fol. 83] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

Frederick C. Bangs, being duly sworn, deposes and says: That he is the attorney for the executors-appellants in the above entitled proceeding and in charge of this appeal. That upon the affirmance of the order appealed from by the Appellate Division, First Department, no opinion was handed down by said Appellate Division.

—— ——.

Sworn to before me this 8th day of December, 1936. —— ——, Notary Public, Kings County. Kings Co. Cl'k's No. 228, Reg. No. 8278. N. Y. Co. Cl'k's No. 720, Reg. No. 8W479. Commission expires Mar. 30, 1938. (Seal.)

[fol. 84] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the foregoing printed papers are true and correct copies of the Notice of Appeal, Order Appealed From and of all the papers upon which the Court below acted in making the order appealed from, now on file in the Office of the Clerk of the Surrogate's Court of the County of New York, and that the appeal herein be heard upon the foregoing record without certification thereof, which is hereby waived pursuant to Section 170 of the Civil Practice Act.

Dated, New York, December 29, 1936.

Frederick C. Bangs, Attorney for Apepllants. Edgar Hirschberg, Attorney for Respondent.

[fol. 85] STATE OF NEW YORK,
County of New York, ss:

I, Charles P. Sheridan, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of remittitur from Court of Appeals in the matter of the estate tax upon the estate of Katherine H. Brown, deceased, Filed, May 7th, 1937, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York, this 20th day of July in the year of our Lord one thousand nine hundred and thirty-seven.

Charles P. Sheridan, Clerk of the Surrogate's Court.
(New York Surrogate's Seal.)

P-21-1932.
M.

[fol. 86] [Stamp:] Office of the Clerk, Supreme Court, U. S., Received Jul. 15, 1937

COURT OF APPEALS

State Reporter's Office

STATE OF NEW YORK, ss:

I, Louis J. Rezzemini, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of In the Matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased, decided by the Court of Appeals on the twenty-seventh day of April 1937, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this twelfth day of July 1937.

Louis J. Rezzemini, As Reporter of the Court of Appeals of the State of New York. (Seal Court of Appeals, State of New York.)

Attest: John Ludden, Clerk of the Court of Appeals. (L. S.)

COURT OF APPEALS

STATE OF NEW YORK:

I, Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that John Ludden is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Louis J. Rezzemini is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of In the Matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased, decided by the said Court of Appeals on the twenty-seventh day of April 1937, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of John Ludden, as clerk of said court, appended thereto is the true and genuine signature of said John Ludden, and the signature of Louis J. Rezzemini, as reporter of said court, appended thereto is the true and genuine signature of said Louis J. Rezzemini.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York on the thirteenth day of July, in the year one thousand nine hundred and thirty-seven.

Frederick E. Crane, As Chief Judge of the Court of Appeals of the State of New York.

[fol. 87] In the Matter of the Estate Tax upon the Estate of KATHERINE H. BROWN, Deceased

MARION BROWN ELLIOTT, HORACE F. PHELPS, CITY BANK FARMERS TRUST COMPANY and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, Deceased, Appellants, and The State Tax Commission, Respondent

(Decided April 27, 1937).

Appeal by executors from order of Appellate Division, first department, which unanimously affirmed order of Surrogate's Court, New York county, denying an appeal and affirming the pro forma order fixing the estate tax upon the estate of the decedent.

Frederick C. Bangs for executors, appellants.
Edgar Hirschberg for State Tax Commission, respondent.

RIPPEY, J.:

On December 11, 1931, Katherine H. Brown died within the State of New York, leaving a last will and testament dated and executed December 1, 1931. She left real and personal property within the State of Colorado aggregating $362,447.03, which was administered in the county of Denver. Having property, real and personal, within the State of New York, her will was also probated in New York county. Upon proceedings to establish the inheritance tax due to the State of New York, the Inheritance Tax Appraiser for New York county included an item of $265,767.03, which represented a part of her estate administered within and taxed by the State of Colorado, and recommended a transfer tax thereon under article 10-C of the Tax Law (Cons. Laws, ch. *60*) of the State of New York. The tax on this item paid to the State of Colorado was $15,653.82. Upon the report of the Appraiser, the Surrogate of New York county made a pro forma order imposing a transfer tax upon the identical property of $13,967.79.

In the notice of appeal to the Surrogate from the pro forma order, the executors of the estate objected to the imposition of any such tax by the State of New York on the grounds, among others, that article 10-C of the Tax Law of the State of New York should be so construed and

interpreted that no part of and no interest in the securities and other property in question constituted a part of the gross estate of the decedent situated in the State of New York at the time of her death and subject to transfer tax as a part of her estate; that if it were not so interpreted, the applicable provisions of article 10-C of the Tax Law [fol. 88] should be declared unconstitutional as in violation of the due process clause of the Constitution of the State of New York and of the due process clause embraced in the Fourteenth Amendment to the Constitution of the United States; and that the tax assessed or attempted to be assessed was erroneous, arbitrary, unjust and illegal and in violation of the rights of the executor under the Constitutions of the State of New York and of the United States as above mentioned. The Surrogate overruled the objections and made a final order assessing the tax. Upon appeal, the Appellate Division of the first department affirmed.

The deceased had been a resident of and domiciled within the State of Colorado for many years. On December 30, 1924, while the deceased was a resident of Denver and domiciled within the State of Colorado she executed and delivered to the Denver National Bank, of Denver, Colorado, as trustee, a trust indenture wherein was provided that from the income of the securities and property then deposited with the bank and constituting the res of the trust the trustee should pay to her daughter Marion K. Brown Elliott, $1,000 on the first day of each and every month during the term of her natural life, provided that in the event the income therefrom should not be sufficient to pay such monthly installment, the installment should be proportionately reduced, but if the income exceeded the amount required to make such payments the excess should become a part of the trust estate. In the trust deed it was further provided that after the death of said daughter the trustee should pay the income to the children of the daughter then living, share and share alike, until such children or any of them should reach the age of twenty-five years. Upon the arrival of any child at the age of twenty-five years, an equal proportional share of the principal of the trust was required to be paid to such child. If no child or children should survive the daughter, it was provided that the corpus of the trust should revert to and become a part of the settlor's estate to be distributed in accordance with the terms of her will. The trust was created upon certain ex-

press conditions. So far as material, the settlor reserved the right at any time upon ten days' written notice to the trustee (1) to change the beneficiary or any of them without the consent of such beneficiary; (2) to revoke the trust and revest in herself title to the corpus of the trust; (3) upon 30 days written notice, for herself, if living, and if not living, for her daughter, to remove the trustee or any substitute trustee.

The trust res listed in the deed of trust, legal title to which was transferred by the settlor to the trustee by the express terms of the trust instrument, consisted of Federal [fol. 89] and Colorado State, municipal, school district, industrial and public service bonds aggregating in value $243,000. The trustee was given the power of substitution of property with the consent of the settlor. The trustee duly accepted the trust, entered upon its administration, and has at all times continued to administer it, both before and after the settlor's death. There was no revocation of the trust or change of beneficiary or trustee or diversion of the income from the use and benefit of the daughter during the lifetime of the settlor and the beneficiaries were all living at the time of her death.

In an action duly commenced and prosecuted in the courts of Colorado after the death of the settlor to establish the status of the trust and trustee and terminated before proceedings were instituted in New York county before the Inheritance Tax Appraiser, it was found and adjudged that the trust agreement was not revoked by Mrs. Brown in her lifetime, that a valid trust existed and that the executors and trustees, devisees and legatees under her last will and testament had no interest in either the corpus or income of the trust by virtue of the terms of the will except in the event that distribution of the corpus of the trust should be required by the executors because of lack of beneficiaries to whom it could be distributed by the trustee under the terms of the trust indenture.

It is asserted by respondent and has been found by the Surrogate and affirmed by the Appellate Division that Mrs. Brown changed her residence from the State of Colorado to the State of New York and was domiciled within the latter State at the time of her death. This is not contested.

Assuming that domicile in New York State was established, the trust estate is still not taxable within the State of New York, because the trust estate had a fixed situs

[fol. 90] within the State of Colorado. It will again be noted that the trust was created by a resident of the State of Colorado while domiciled therein; that the trust indenture with the corpus of the trust was deposited with the Colorado trustee, whose domicile and residence were in Denver, Colorado; that the trust estate has remained and been administered in Denver, Colorado, since its creation in 1924; that the intent of the settlor was that the trust res should be and remain in the State of Colorado and there be administered both before and after her death; that its location has never changed; that there has been no change in the terms or character of the trust or of the obligations of the trustee since its creation; and that no such change could be made except at the domicile of the trustee. Under what circumstances could intangible property have a more certain and fixed status and location?

It has been settled by the Supreme Court that real property, as between the States, may be taxed only by the jurisdiction where it is located. (First Nat. Bank v. Maine, 284 U. S. 312; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194.) It has also been definitely settled that the right of succession to the ownership of tangible personal property arising through death can be taxed only as its permanent situs. (Frick v. Pennsylvania, 268 U. S. 473; Matter of Swift, 137 N. Y. 77.) The location of both classes of property at the time the right to impose the tax arises is held to be the determining factor. These decisions rest upon the proposition that the property, the ownership or devolution of which is the subject of tax, must be within the jurisdiction of the taxing power. Predicated upon similar facts as to location, there seems to be no reason or logic for arbitrarily applying the ancient maxim mobilia sequuntur personam to the devolution of intangibles. That maxim is nothing more than a legal fiction properly applied to prevent injustice and resorted to only when justice and necessity require (Union Refrigerator Transit Co. v. Kentucky, supra), because, as pointed out in that case (p. 205), intangible property "is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs. * * * So," says the court, "if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicile, or the collection of the tax otherwise enforced." In cases where the actual or business situs of intangibles

cannot be readily ascertained, as a rule of convenience and necessity the maxim is still applied, but only because the situs of the property must be deemed, by necessity, to be that of the domicile of the owner. (Baldwin v. Missouri, 281 U. S. 586; Beidler v. South Carolina Tax Comm., 282 U. S. 1; First Nat. Bank v. Maine, 284 U. S. 311.)

[fol. 91] The principle that situs of intangible personalty follows domicile, frequently arbitrarily and strictly applied, has given way to the logical and rational exception that where "the fact is clear that the intangible property has a situs elsewhere," the fiction will not be followed. (New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington County, 177 U. S. 133; State Board of Assessors v. Comptoir National d'Escompte, 191 U. S. 388; Metropolitan Life Ins. Co. v. City of New Orleans, 205 U. S. 395; Liverpool & London & Globe Ins. Co. v. Orleans Assessors, 221 U. S. 346; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83; Matter of Swift, supra; DeGanay v. Lederer, 250 U. S. 376; Wheeling Steel Corp. v. Fox, 298 U. S. 193; People ex rel. Whitney v. Graves, 299 U. S. —; 57 Sup. Ct. Rep. 237; Cf. Hutchison v. Ross, 262 N. Y. 381.)

Respecting jurisdiction over the thing taxed, there can be no distinction between general property and inheritance taxes. We cannot follow the fiction, as respondent desires, that the inheritance tax is not imposed on the trust property. Theoretically, that may be so. Practically, it is not so. It is, of course, the right to succession that gives the opportunity to tax. But the practical consideration remains that it is the value of the property to which title or interest passes that lays the basis for the tax. Fiction and fancy theories have been advanced and attempt has been made to engraft them into tax laws to avoid the operation of logical and rational rules applicable to any sanely organized tax system.

In the Swift Case (supra) this court said: "When succession to the ownership of property is by the permission of the state, then the permission can relate only to property over which the state has dominion and as to which it grants the privilege or permission. * * * Neither the doctrine of equitable conversion of lands, nor any fiction of situs of movables can have any bearing upon the question under advisement. The question of the jurisdiction of the state to tax is one of fact and cannot turn upon theories or fictions; which, as it has been observed, have no place in

a well adjusted system of taxation. We can arrive at no other conclusion, in my opinion, than that the tax provided for in this law [referring to Collateral Inheritance Tax Act, Laws of 1885, ch. 483] is only enforceable as to property which, at the time of its owner's death, was within the territorial limits of this state" (p. 86).

The Wheeling Steel Corporation Case (supra), had to do with an ad valorem property tax on net income, and the court refers to the general rule of necessity for the application of the maxim mobilia sequuntur personam and calls attention to the principle announced in Farmers Loan & Trust Co. v. Minnesota (280 U. S. 204, 211, 212), [fol. 92] that as to intangibles no sufficient reason exists for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. Such principle has had progressive application.

In Hutchison v. Ross (262 N. Y. 381) this court said: "The maxim 'mobilia sequuntur personam' cannot always be carried to its logical conclusion. Practical considerations often stand in the way. The physical presence in one jurisdiction is a fact, the maxim is only a juristic formula which cannot destroy the fact" (p. 388).

In the Whitney Case (supra), the latest pronouncement of the Supreme Court on the subject, the foregoing exception to the rule of necessity is recognized and applied. No case has been called to our attention in any jurisdiction which has not followed the law, where the facts warranted, whether the tax involved is a general property tax or an inheritance tax, as laid down in the case of Safe Deposit & Trust Co. v. Virginia (supra), where it is said: "The general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise" (p. 92).

The decision in the case of Guaranty Trust Co. v. Blodgett (287 U. S. 509), upon which respondent so heavily leans, has no bearing upon the question here involved. In that case the settlor retained the income of the trust during life, while here the income was transferred to the beneficiary on the date of the formation of the trust. On the facts in the Blodgett case it was held merely that a statute imposing a tax upon the succession to the enjoy-

ment of property was constitutional. The cases of Bullen v. Wisconsin (240 U. S. 625) and Blodgett v. Silberman (277 U. S. 1) are clearly distinguishable from the facts in the case at bar. In the former case, in the deed of trust the donor retained the income for life with power of appointment, and provided that no portion of the principal or income be paid over to any person before the donor's death unless by his direction, and in the latter no determination was made as to whether the property had a taxable situs in New York State, Connecticut being the State of residence of the deceased. Both cases were substantially held in Safe Deposit & Trust Co. v. Virginia (supra) to have no bearing where the fact of situs in a State other than that of the settlor is established.

It has also been authoritatively held that where the legal title to the res is vested in the trustee, jurisdiction to tax is at the domicile of the trustee where the trust [fol. 93] is to be administered. (2 Cooley on The Law of Taxation [4th ed.] § 469; 26 R. C. L., Taxation, § 259; Guthrie v. Pittsburgh, C. & St. L. Ry. Co., 158 Penn. St. 433; Thorne v. State, 145 Minn. 412; Baldwin v. Shine, 84 Ky. 502; Safe Deposit & Trust Co. v. Virginia, supra.)

Section 249-r of article 10-C of the New York State Tax Law, in force at the time of the settlor's death, provided that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this State): 1. To the extent of the interest therein of the decedent at the time of his death. * * * 3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferror has retained for his life or any period not ending before his death * * * (b) the right * * * to designate the persons who shall possess or enjoy the property or the income therefrom * * *. 4. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to

alter, amend or revoke, or where the decedent relinquished any such power in contemplation of his death." It is clear that it is intended to include within the gross estate of a decedent domiciled within the State of New York at the time of his death intangible property wherever situate, without reference to the fact that it may have acquired and had an actual or business situs outside of the State of New York. The State has no power to tax property located beyond its jurisdiction. (Matter of Swift, supra.) To the extent that it has attempted to do so, it must be held that the statute in question is in violation of the due process provision of the Fourteenth Amendment, and is unconstitutional and void.

The orders should be reversed and the matter remitted to the Surrogate's Court to proceed in the matter of the inheritance tax proceedings in accordance with this opinion, with costs to the appellant in all courts. (See 274 N. Y. 634.)

Crane, Ch. J., Lehman, O'Brien, Hubbs, Loughran and Finch, JJ., concur.

Ordered accordingly.

Submitted June 7, 1937; decided June 11, 1937.

Motion for reargument denied. Opinion modified so as to state that there was no question raised regarding domicile or residence in New York State.

[fol. 94] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany on the 27th day of April in the year of Our Lord One Thousand Nine Hundred and Thirty-seven before the Judges of Said Court.

Witness The Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—April 28, 1937

In the Matter of the Estate Tax Upon the Estate of KATHERINE H. BROWN, Deceased

Be it Remembered that on the 31st day of December, in the year of Our Lord, One Thousand Nine Hundred and Thirty-six, Marion Brown, Elliott and others, as Execu-

[fol. 94-a] Therefore it is considered that the said orders be reversed and matter remitted to Surrogate's Court to proceed in accordance with opinion herein with costs to the appellant in all courts as aforesaid and hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by it given in the premises are by the said Court of Appeals remitted into the Surrogate's Court New York County—before the Surrogates thereof according to the form of the statute in such case made and provided to be enforced according to Law and which record now remains in the said Surrogate's Court before the Surrogates thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Albany, April 28, 1937.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein attached thereto.

John Ludden, Clerk. (Seal.)

tors &c. of Katherine E. Brown, deceased. The appellants in this cause came here unto the Court of Appeals by Frederick C. Bangs, their attorney and filed in the said Court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department, and State Tax Commission—

The respondent in said cause afterwards appeared in said Court of Appeals by Edgar Hirschberg its attorney. Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Frederick C. Bangs, of Counsel for the appellant; and by Mr. Seth T. Cole, of Counsel for the respondent, and after due deliberation had thereon did order and adjudge that the orders herein be and the same hereby are reversed and matter remitted to Surrogate's Court to proceed in accordance with opinion herein with costs to the appellant in all courts—

And it was also further ordered that the records aforesaid and the proceedings in this court be remitted to the Surrogate's Court New York County—there to be proceeded upon according to Law.

[fol. 95] At a Surrogate's Court, held in and for the County of New York, at the Hall of Records in said County on the 14th day of May, 1937.

Present: Honorable James A. Foley, Surrogate.

P21-1932

In the Matter of the Estate Tax Upon the Estate of KATHERINE H. BROWN, Deceased

MARION BROWN ELLIOTT, HORACE F. PHELPS, CITY BANK FARMERS TRUST COMPANY and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, Deceased, Appellants, and The State Tax Commission, Respondent

ORDER ON REMITTITUR

An appeal having been taken by the above named Executors of the Last Will and Testament of Katherine H. Brown, deceased, to the Court of Appeals of the State of

New York from an order of the Appellate Division of the Supreme Court in and for the First Judicial Department affirming an order of the Surrogate's Court of New York County made and entered in the Office of the Clerk of this Court on the 26th day of November, 1934, which said order denied the appeal of the Executors from, and affirmed the pro forma order and determination of the Surrogate, entered in the Office of the Clerk of this Court on the 28th day of November, 1933, fixing the estate tax upon the estate of the above named decedent; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the said Court of Appeals having ordered and [fol. 96] adjudged that the orders so appealed from as aforesaid be reversed with costs to the Appellants in all Courts and having further ordered and adjudged that the proceeding therein be remitted to this Court, there to be proceeded upon according to law and in accordance with the opinion of said Court of Appeals; and the Remittitur from the said Court of Appeals together with a certified copy of the order of said Court having been duly filed in the Office of the Clerk of Surrogate's Court of New York County on the 7th day of May, 1937; now, on motion of Frederick C. Bangs, attorney for the Appellants herein, it is hereby

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order of this Court; and it is further

Ordered that pursuant to the order of the Court of Appeals the Appellants above named recover from the State Tax Commission of the State of New York, the Respondent herein, the sum of Five hundred twenty-nine and 33/100 ($529.33) Dollars, their costs and disbursements herein, as taxed.

And the said Court of Appeals by its opinion herein having held that the principal of a certain trust established by Katherine H. Brown, this decedent, by trust indenture dated December 30, 1924 with the Denver National Bank of Denver, Colorado, as Trustee, over which trust the settlor reserved a power of revocation, was improperly and illegally included as a part of her gross estate for estate tax purposes in that said trust fund at the death of this decedent had a fixed and actual situs within the State of Colorado and was wholly without the jurisdiction of the State of New York, and that insofar as Section 249-r of

Article 10-C of the New York State Tax Law attempted to tax the transfer of said fund, it must be held to be in violation of the due process provision of the Fourteenth Amend-
[fol. 97] ment to the Federal Constitution and to be unconstitutional and void; and the said Court of Appeals having ordered that the proceeding be remitted to this Court there to be proceeded upon in accordance with its opinion, it is further

Ordered that the said trust fund of an appraised value of $265,767.03 be excluded from the gross estate of this decedent for New York Estate Tax purposes and that the order assessing the estate tax upon the Estate of Katherine H. Brown, deceased, entered herein on the 28th day of November, 1933 be and the same hereby is amended to read as follows:

At a Surrogate's Court, held in and for the County of New York, at the Hall of Records in said County, on the 28th day of November, 1933.

Present: Hon. James A. Foley, Surrogate.

P21-1932

In the Matter of the Appraisal of the Estate of KATHERINE H. BROWN, Deceased

ORDER ASSESSING TAX

On reading the report filed the 27th day of November, 1933, of Jacob Manicoff, Esquire, the appraiser appointed by order of this Court, dated the 26th day of January, 1933, and it appearing that the said decedent died on the 11th day of December, 1931, it is

Ordered and Adjudged that the market value of the gross estate of said decedent at the time of death, the amount of exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, [fol. 98] and the amount of tax to which the same is liable, shall be and the same hereby is assessed, fixed and determined as follows:

Gross Estate	$1,100.011.28
Total deductions allowed by statute	314,407.28
Net Estate	785,604.00

Tax on net estate not in excess of $150,000 less $20,000 exemptions allowed under Section 249-q	1,040.00
Tax on net estate in excess of $150,000	21,708.99
Total Tax	$22,748.99

James A. Foley, Surrogate.

STATE OF NEW YORK:
County of New York, ss:

I, Charles P. Sheridan, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of order on remittitur and order assessing tax in the matter of the estate tax upon the estate of Katherine H. Brown, deceased, filed, May 15th, 1937, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York, this 20th day of July, in the year of our Lord one thousand nine hundred and thirty-seven.

Charles P. Sheridan, Clerk of the Surrogate's Court. (New York Surrogate's Seal.) P-21-1932. M.

[fol. 99] [Endorsed:] P-21-1932. Surrogate's Court, New York County. In the matter of the Estate Tax upon the Estate of Katherine H. Brown, Deceased. Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company, and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, deceased, Appellants, and The State Tax Commission, Respondent. Order on Remittitur with Notice of Entry. Frederick C. Bangs, Attorney for Executors-Appellants, 36 West 44th Street, Borough of Manhattan, New York City. Filed, May 15, 1937.

SIRS:

Please Take Notice that the within is a true copy of an Order duly made, entered and filed herein in the office of

the Clerk of the Court at the Hall of Records, Borough of Manhattan, on the 14th day of May, 1937.

Dated, New York, N. Y., May 17, 1937.

Yours, etc., Frederick C. Bangs, Attorney for Executors-Appellants, Office & P. O. Address, 36 West 44th Street, Borough of Manhattan, New York City.

Received May 18, 1937, Transfer Tax Bureau Attorney's Office.

[fol. 100] IN COURT OF APPEALS

STATE OF NEW YORK:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the eleventh day of June, A. D. 1937.

Present, Hon. Frederick E. Crane, Chief Judge, presiding.

In the Matter of the Estate Tax upon the Estate of KATHERINE H. BROWN, Deceased

MARION BROWN ELLIOTT, HORACE F. PHELPS, CITY BANK FARMERS TRUST COMPANY and The Colorado National Bank of Denver, as Executors of the Last Will and Testament of Katherine H. Brown, Deceased, Appellants, and The State Tax Commission, Respondent

A Motion for a re-argument of the above cause, having been heretofore made upon the part of the respondent herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

A Copy.

John Ludden, Clerk. (Seal Court of Appeals, State of New York.)

[fol. 101] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 372

ORDER ALLOWING CERTIORARI—Filed November 14, 1938

On Petition for Writ of Certiorari to the Surrogates' Court of the County of New York, State of New York.

A petition for rehearing having been filed in this case upon the denial of the petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, and the case is assigned for argument immediately following No. 339.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,853. New York Surrogates' Court of County of New York. Term No. 372. Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Petitioners, vs. Marion Brown Elliott, Horace F. Phelps, City Bank Farmers Trust Company, et al., etc. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1937. Term No. 372, O. T., 1937.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1938

No. 372

STALEY ELEVATOR CO., INC.,
Petitioner,

and

570 BUILDING CORPORATION, SAMUEL COHEN and JACOB C. COHEN,
Petitioners,

vs.

OTIS ELEVATOR COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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ACKERMAN PRESS, Inc., 142 Liberty St., 'Phones Rector 2-5356-7

SUBJECT INDEX

CASES CITED

STATUTES CITED

Supreme Court of the United States

OCTOBER TERM, 1938.

No.

STALEY ELEVATOR CO., INC.,

Petitioner,

and

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Staley Elevator Co., Inc., 570 Building Corporation, Samuel Cohen and Jacob C. Cohen, pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that

Court entered on July 29, 1938 (IV, 2049) affirming a decree of the District Court for the Eastern District of New York (IV, 2030-3) holding valid and infringed claims 1 to 29 inclusive of Larson's patent 1,694,823 granted December 11, 1928, and claims 4 to 6 inclusive, 9 to 14 inclusive, 23, 27, 28 and 76 to 84 inclusive of Lindquist at al. patent 1,904,647 granted April 18, 1933. A certified transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of the rules of this Court.

Summary Statement of the Matter Involved

The patents relate to "collective" automatic push-button elevators.

An automatic push-button elevator is one that may be started by pressing any one of a series of push-buttons arranged in the car and numbered to correspond to the several floors, or by any one of a series of push-buttons located at the several floor landings, and is automatically stopped at the desired floor; that is, at the floor corresponding to the numbered push-button selected and pressed by a passenger in the car, or at the floor landing at which a prospective passenger has pressed a push-button to call the car. A "collective" automatic push-button elevator is one that has provision for registering a number of calls and deferring the response to them, so that when buttons corresponding to different floors are pushed the car will proceed on its journey, automatically stopping at the several floors in the order in which the floors are reached, irrespective of the sequence in which the buttons have been pressed, and restarting to respond to the deferred calls after each stop.

In Larson's patent (III, 1166) there is but one push-button at each floor landing and consequently the prospective

passenger has no way to indicate whether he wants to go up or down. As soon as the car comes from either direction to a landing at which a button has been pressed, it will automatically stop, without regard to the desired direction of travel of the prospective passenger. For instance, if a prospective passenger at some floor landing wants to go down and presses the button at that landing when the car is below that landing but on its way up, the car will stop on its up journey and if the passenger gets in he will be carried up to the end of the up journey before he is taken down.

The Lindquist et al. patent (III, 1192) has two push-buttons at each floor landing—one for "up" and one for "down" travel. The up and down buttons are arranged in separate registering circuits so that the elevator car collects only the "up" calls on the up journey and the "down" calls on the down journey.

The elevator art has long included two types of elevators: (1) "car switch operated" elevators and (2) automatic push-button elevators.

A car switch elevator is operated by an attendant through a hand switch in the car which controls the starting and the stopping of the car. The starting and the stopping are wholly at the will of the elevator attendant.

The old automatic push-button elevator (most widely used in clubs and private dwellings and referred to in this record and in the opinion of the Court of Appeals as the SOB system) was not "collective". It was started by pressing any one of the push-buttons in the car or any one of the push-buttons at the several floor landings, and it was automatically stopped at the desired floor; but it did not register the calls or defer the response. The passenger who first pushed a button obtained and retained control of the car until he had completed his journey. In the meantime, all calls subsequent to his were rendered

ineffective. The control circuits of all the other push-buttons were interrupted until the car was released by the first passenger.

In January, 1922, prior to the filing of either of the patents in suit, one Parker brought to the attention of respondent, Otis Elevator Company, his pending application for a patent filed April, 1921 (prior to any date available to either of the suit patents here involved), describing an automatic push-button "stop control" as applied to a "car switch" type elevator. Parker's system provided push-buttons in the car, one for each floor, and "up" and "down" buttons at each floor landing. In the Parker system, the "stops" are "collective". That is, they are registered and deferred so that if a number of buttons corresponding to different floors are pressed the car will automatically stop at the several floors in the order in which the floors are reached, irrespective of the sequence in which the buttons have been pressed. The mechanism, with all its electrical circuits, is called a "floor selector".

Because Parker had an "up" and a "down" button at each landing, arranged in separate registering circuits, his car responds to (collects) only the "up" calls on the up journey and the "down" calls on the down journey.

In the system disclosed in Parker's patent the automatic stop control is applied to a car switch elevator. The starting is wholly within the control of the attendant.

Parker, in January, 1922, explained his automatic push-button stopping system to Mr. Lindquist, chief engineer of respondent (and one of the joint applicants of the Lindquist patent), and left with Mr. Lindquist a copy of the Parker patent application and drawings (I, 297). Respondent proceeded to install, in the Standard Oil building at 26 Broadway, New York City, an elevator in accordance with the Parker system. Work on this installation was under

way prior to April, 1922 (I, 355)—prior to the filing dates of the Larson and Lindquist patents.

The Parker patent issued on August 26, 1924 (III, 1390) and, subsequent to the completion of the installation in the Standard Oil building, was purchased by respondent in 1925. As issued the Parker patent claims were limited to an elevator system in which the Parker automatic stop system was applied to a car switch type elevator (IV, 1690). Respondent, through its Patent Department, reissued the patent (Reissue 16,297, III, 1390) to cover the application of Parker's control to all elevators, without regard to the kind of starting control employed.

Thereafter respondent prosecuted and obtained in the Larson patent claims for applying Parker's control to a "one button per floor" automatic push-button elevator system; and then the Lindquist patent for applying Parker's control to an "up and down two button per floor" automatic push-button elevator system. In this way respondent's monopoly of Parker's idea was extended, with respect to automatic push-button elevator systems, at first, by Larson's patent, to 1945, and then, by the Lindquist patent, to 1950.

The scope of the monopoly claimed in the two patents in suit is not confined to any particular arrangement of circuits by means of which calls are registered, sifted and responded to, or by which the starting and stopping of the car is controlled.*

To these claims your petitioner interposed the defenses of lack of invention and non-infringement.

The Court of Appeals said (IV, 2054): "In effect the patents in suit combine the 'floor selector' mechanism of the Parker system with the starting and direction-determining mechanism of the old SOB system", but the court re-

*See typical claims set forth in opinion of Court of Appeals (IV, 2050-51).

jected the defense of no invention (IV, 2054-5) as insufficiently proved in view of the complexity of the electrical circuits which control the car movements and because the "burden was upon the appellants to rebut the presumption of validity arising from the issuance of the patents by the Patent Office, which had before it the Parker reference. They have not carried that burden."

Although a patentee is required, by Revised Statutes, Section 4888,* "in case of a machine" to "explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions" Larson's patent does not do that. When the Larson patent is read with the knowledge which respondent possessed as to the nature and applicability of Parker's invention, it shows a deliberate omission to comply with the statutory requirement.

The Larson patent (III, 1166) explains that there are "at least two types of electric elevators: one known as a car switch operated elevator which is operated by the operator of the car; and the other a push-button automatic elevator which is controlled by the pushing of buttons corresponding to the floors served by the elevator" (ls. 7-14);

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*R. S. 4888, c. 94, Sec. 1, 38 Stat. 958. *Application for patent; description; specification and claim.* Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim shall be signed by the inventor. No plant patent shall be declared invalid on the ground of non-compliance with this section if the description is made as complete as is reasonably possible.

and goes on to point out that running past intermediate floors at which passengers might have been discharged or prospective passengers might have gotten on is a fault common to car switch operated elevators and push-button automatic elevators alike—that, "In brief the operation of the prior art push-button elevator for more than two floors is in the respect written about open to the same objection made to the car switch elevator" (III, 1166, ls. 15-27 and 1166, 99 to 1167, l. 13).

Although respondent, by whom the Larson application was filed and prosecuted, knew that Parker had already overcome the objectionable running past intermediate floors by providing automatic mechanism for causing the elevator to obey all stop signals, and had applied that remedy to cure the fault in car switch operated elevators, the patent specification says nothing about that. The language of the specification is (III, 1167, ls. 26 et seq.) "It is the object of my invention to produce such a *push-button elevator* . . . which will . . . invariably obey the signals . . .". The Patent Office was not told that this limited object, to cure one half the recited fault in elevator operation, was achieved merely by applying to automatic push-button elevators the same cure that Parker had already applied to the other half of the same fault in car switch operated elevators.

This failure to advise the Patent Office of the truth with respect to the prior art, deprived the Patent Office of all fair opportunity to judge whether invention was involved.

The claims of the Lindquist et al. patent (which, under the decision of the Court of Appeals, further extend the monopoly with respect to automatic push-button elevators) are predicated solely upon the fact that Lindquist et al. substituted for Larson's single floor buttons, Parker's arrangement of the two buttons, an "up" button and a "down" button at each floor. In this patent too there is no compliance with the requirement of Section 4888.

Reasons Relied on for Allowance of Writ

The discretionary power of this Court to grant a writ of certiorari is invoked upon the ground that there is here involved an important question of patent law that has been decided in a way which is untenable or in conflict with the weight of authority and against the great interest (a) of all those members of the public who are interested in making, buying or using automatic push-button elevators and (b) of the public in general which would be adversely affected by the precedent of the instant case, namely:

(1) The decision of the Court of Appeals holding Larson's patent valid and infringed, prolongs respondent's monopoly under the Parker reissued patent (when used in automatic push-button elevators) from March 23, 1943, the date of expiration of the Parker reissue to December 11, 1945, and similarly the decision holding valid and infringed the Lindquist et al. patent further prolongs the monopoly to April 18, 1950; in contravention of the rule that the application of an old machine or instrumentality to a new and analogous use is not invention.*

(2) The decision of the Court of Appeals holding Larson's patent valid and infringed, upon the ground that Larson had to overcome complexities of electrical circuit connections in order to apply Parker's stop control to an automatic push-button elevator, erroneously upholds a broad monopoly, not for some particular means of overcoming such complexity, but for any and all means of applying Parker's stop control to automatic push-button elevators; in contravention of the established rule that a patent cannot validly be granted, even to one who first attains a desired end, for all means of attaining that end.**

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*See cases cited in the brief accompanying this Petition.

**_Holland Furniture_ v. _Perkins Glue Co._, 277 U. S. 245, 257 and cases there cited.

(3) The Court of Appeals further erred in sustaining the claims of the Lindquist et al. patent in contravention of the well established rule that one who has substituted for one of the parts of an old combination a different part (even a novel one), cannot lawfully claim that part in combination with other old parts which perform no new function in the combination.*

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals be reversed; and that petitioners be granted such other and further relief as may be proper.

WILLIAM H. DAVIS,
WILLIS H. TAYLOR, JR.,
Counsel for Petitioners.

Dated, September 22, 1938.

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*Lincoln, etc., Co. v. Stewart-Warner Corp., 303 U. S. 545, 549, 550 and cases there cited.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of the District Court for the Eastern District of New York, written by Judge Moscowitz, appears at page 1970, Vol. IV, of the record. It is reported at 35 U. S. P. Q. 420. The opinion of the Circuit Court of Appeals for the Second Circuit (Circuit Judges Mar[illegible], Swan and Chase), written by Judge Swan, appears at [illegible] 2049, Vol. IV, of the record. It has not been reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (28 U. S. C., sec. 347). Cases believed to sustain the jurisdiction are *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664; *Carbice Corp of Am.* v. *American Patents Development Corp., et al.*, 283 U. S. 27; and *Simmons* v. *Greer*, 258 U. S. 82.

The decree of the Circuit Court of Appeals which petitioners seek to have reviewed was entered July 29, 1938 (IV, 2049). Thereafter, a petition for rehearing was filed, which was denied on August 30, 1938 (R. IV, 2094-5).

Statement of the Case

The essential facts of the case are stated in the accompanying petition for writ of certiorari and need not be repeated here.

Specification of Errors

If the writ of certiorari is issued, petitioners intend to urge that the Circuit Court of Appeals for the Second Circuit erred:

(1) In holding valid and infringed Claims 1-29, inclusive, of the Larson suit patent, and Claims 4-6, 9-14, 23, 27, 28, and 76-84, inclusive, of the Lindquist suit patent.

(2) In affirming the decree of the District Court holding the Larson and Lindquist suit patents valid and infringed.

Argument

In holding valid and infringed the claims of Larson's patent upon which respondent relies (claims 1 to 29 inclusive) the Court of Appeals approved the prolongation of respondent's monopoly of Parker's automatic stop-control (when used in automatic push-button elevators) in contravention of the rule that the application of an old machine or instrumentality to a new and analogous use is not invention.*

Neither one of the patents had been adjudicated before, and there is accordingly no conflict of decisions as to their validity. The primary grounds for certiorari are that the

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**Phillips* v. *Page*, 24 How. 164, 167; *Brown* v. *Piper*, 91 U. S. 37, 4', *Roberts* v. *Ryer*, 91 U. S. 150, 157; *Planing Machine* v. *Keith*, 101 U. S. 479, 491; *Heald* v. *Rice*, 104 U. S. 737, 754-756; *Atlantic Works* v. *Brady*, 107 U. S. 192; *Pennsylvania, etc., Co.* v. *Locomotive, etc., Co.*, 110 U. S. 490, 494; *Morris* v. *McMillen*, 112 U. S. 244, 248; *Thatcher* v. *Burtis*, 121 U. S. 286, 294-5; *Consolidated Roller Mill Co.* v. *Walker*, 138 U. S. 124, 131-133; *Ansonia* v. *Electrical Supply Co.*, 144 U. S. 11, 17-18; *Pope* v. *Gormully & Jeffery*, 144 U. S. 254, 259-260; *Mast, Foos* v. *Stover*, 177 U. S. 485, 492-3; *Concrete Appliances* v. *Gomery*, 269 U. S. 177, 184-5; and *Powers Kennedy* v. *Concrete Co.*, 282 U. S. 175, 186-7.

decision of the Court below is based upon error apparent on the face of its opinion, and that the correction of such error is not merely of concern to petitioners, but is (a) of vital importance to all of the some hundred independent manufacturers of automatic push-button elevators throughout the United States, and (b) of great importance to the public in general which would be adversely affected by the precedent of the instant case, which substantially breaks down the rule that a patent may not validly be granted for the new use of an old machine within the field of its inherent utility, even though that new use and its effect had not before been contemplated.

Respondent, Otis Elevator Company, and Westinghouse Electric & Mfg. Company, its largest competitor, have pooled their competitive patents (IV, 1807-10), including the Larson and Lindquist patents here involved, providing in an agreement dated September 3, 1935 that (IV, 1809):

> "neither will assert against the other nor its respective vendees or customers any United States patent that now or at any time during the life of this Agreement [1950] is owned or controlled by it", etc.

And the agreement further provides that the parties will report to one another in writing all contracts of sale within the scope of the agreement, together with "the number and type of elevators and change-overs involved, the contract price, the address of the installation and the date of the contract" (IV, 1808, f. 5424).

Thus, respondent and the Westinghouse Company are now in a position to *effectively monopolize* the entire *modern* "collective" automatic push-button elevator industry; and doubtless without further litigation, since no small manufacturer could reasonably be expected to finance such litigation under existing circumstances.

That the use of Parker's automatic push-button stop control on the old automatic push-button type of elevator

is analogous to its use, as disclosed by Parker, on the old car switch type of elevator is apparent.

It is made quite clear in the specification of Larson's patent; which correctly recites the common fault (running past intermediate floors at which passengers might have been discharged or prospective passengers might have gotten on) of car switch operated elevators and push-button automatic elevators alike, and says that "the operation of the prior art push button elevator for more than two floors is in the respect written about open to the same objection made to the car switch elevator". (III, 1167, ls. 9-13).

The Court of Appeals, impressed with the complication of the electrical circuit diagrams of such elevator systems, held that your petitioner had not sufficiently proved that it did not require invention (more than mere engineering skill) to *devise the circuit arrangements* by which Larson combined the Parker automatic stopping system with the starting and direction-determining mechanism of the old SOB system.

Even if the Court of Appeals was right in attributing this significance to the complexity of the electrical circuits*

*The fact is that all these complexities, impressive as they are, when one tries to trace the multiplex circuits, had been reduced to simple order in the prior art. The "starting and direction-determining mechanism" of the old SOB system, which was standard equipment, so reduced to order the starting and direction-determining circuits. The old "floor selector" mechanism of the Parker system likewise reduced to order the circuit connections which register and defer the stop signals so that the elevator, in its journeys, will stop as it reaches any floor where a stop signal button had been pressed, regardless of the disorderly sequence in which the several buttons were pressed by the passengers and prospective passengers. When Larson, for the purpose of applying Parker's stop control to the old push-button automatic system, proceeded to "combine the 'floor selector' mechanism of the Parker system with the starting and direction-determining mechanism of the old SOB system" (opinion of the Court of Appeals, IV, 2054) all of the complexity was taken care of, and eliminated so far as he was concerned, within the "floor selector" and the "starting and direction-determining mechanism of the old SOB system". The recital by the Court of

(*Footnote continued on next page.*)

the decision of the Court would nevertheless be erroneous. Claims of the scope sustained cannot be maintained on the basis that inventive ingenuity was required to work out and establish such circuit connections. Such claims could justly be based only upon a finding that the *conception of the idea of applying Parker's automatic stop control* to an automatic push-button elevator system involved invention. Only if the extension of the use had been to a non-analogous field; one that would not suggest itself by necessity of human reasoning to anyone familiar with Parker's idea.

No such suggestion could be made. It is negatived by the fact that respondent reissued the Parker patent to add claims broad enough to embrace the application of Parker's system to an automatic push-button elevator system, and has expressly charged that petitioner's system accused in this suit is also an infringement of the Parker patent so reissued (Ex. O, III, 1434). This suggestion is also negatived by the fact that in the Larson application as originally filed respondent included claims broad enough to embrace the application of the automatic stopping system to all types of elevators.*

(Footnote continued from previous page.)

Appeals of specific complexities (opinion, IV, 2054-5) includes not one that was not overcome in the Parker "floor selector". That instrumentality, as the Parker patent shows, had "three buttons for each floor, two in the hall and one in the car" and the signals were "properly sifted so that the car responds to all calls during one round trip up and down the shaft", etc.; and they were "held in abeyance * * * until all intermediate calls in that direction had been responded to", etc. And the operation of stopping the car at a floor level, which the Court of Appeals refers to as "complex" (IV, 2055) was all within the arrangement and disclosure of Parker's patent.

*For example, claim 13, Exhibit 10, page 36 reads as follows:

"13. A control system for an elevator car comprising, a switch for each floor, and means responsive to the operation of said switches for stopping the car at the floors corresponding to the switches operated in the natural order of floors, though said switches are operated out of said order."

Indeed, the general applicability of Parker's automatic stopping system to all types of elevators is inherent in the very conception of the system. Just as much so as the application of an automatic stop to through passenger trains as well as to local freight trains is inherent in the conception of an automatic train stop; or the application of a method of freezing is inherently applicable to the preservation of fish as well as to the preservation of meat.*

If it be assumed that the Court of Appeals was correct in supposing that the application of Parker's automatic stop system to the old SOB automatic push-button elevators involved wiring difficulties which required inventive ingenuity to overcome, that might afford the basis for a valid patent predicated upon the overcoming of that particular difficulty. In that case we should expect to find in Larson's patent a description of the particular wiring difficulty, and of his means of overcoming it, and specific claims might be sustained for that. It might be that the specific claims not relied on in this case are of that character, but those specific claims were not brought into the litigation because petitioner does not by any means use the specific circuit connections devised by Larson.

The claims which are relied upon, and which it is charged that petitioner has infringed, cover broadly, and without reference to particular circuit connections, the application of Parker's idea to an automatic push-button elevator system. They cover all means for attaining Larson's purpose to apply Parker's system to a push-button automatic elevator. A purpose, or end, which was inherent in the very idea of Parker's automatic stop control. A valid patent cannot be granted, even to one who first attains a desired end, for all means of attaining that end; because such a grant is broader than the field of the patentee's inventive effort and gives him monopoly of fields into which he has

*Brown v. Piper, 91 U. S. 37.

not entered and in which other inventors are as free to work as he was. To sustain such patents would retard rather than promote the progress of science and useful arts.*

The Court of Appeals was equally in error, with respect to the Larson patent, in resting its decision upon the "presumption of validity arising from the issuance of the patent[s] by the Patent Office, which had before it the Parker reference." (opinion IV, 2055) Although Parker's patent was cited by the Patent Office against claims of Larson's application (such as claim 13 quoted above) which broadly claimed the application of the automatic stop to all kinds of elevators; yet Larson (and respondent) consciously and deliberately omitted to comply with the statutory requirement that he must explain the principle of the alleged invention "so as to distinguish it from other inventions"; and never brought home to the patent office that Larson's asserted invention was no more than the application of Parker's system to the old automatic push-button SOB system.

There is much authority for declaring the Larson patent invalid on the single ground that it did not comply with the statutory requirement.** But, beyond this, respondent's conduct in preparing Larson's specification and prosecuting the patent deprived the public (including petitioner) and the courts of all aid from the patent specification in determining what the supposed invention really was; how it differed from what was already known, and whether the application of Parker's automatic stopping

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*Holland Furniture v. Perkins Glue Co., 277 U. S. 245, 257 and cases there cited.

**Evans v. Eaton, 7 Wheat. 356, 434-5; Merrill v. Yeomans, 94 U. S. 568, 570; Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 278; Barrett v. Hall, 2 Fed. Cas. 914, 924; Hovey v. Stevens, 12 Fed. Cas. 615, 618; Lowell v. Lewis, 15 Fed. Cas. 1018, 1020; Jacobs v. Almond, 177 Fed. 935, 936, C. C. A. 2; Steel Wheel Corp. v. B. F. Goodrich, 27 F. (2d) 427, 431, D. C., E. D. Mich., aff. 42 F. (2d) 406.

means to a push-button elevator (instead of to a car switch operated elevator as disclosed by Parker) required any inventive ingenuity beyond the expected skill of an elevator engineer; and it also deprived the patent office of all fair opportunity to judge whether invention was involved. For these reasons, the validity of the patent is without the *prima facie* presumption that ordinarily arises from the grant of a patent by the patent office.*

In holding valid and infringed the claims of the Lindquist et al patent upon which respondent relies (claims 4 to 6, inclusive, 9 to 14, inclusive, 23, 27, 28 and 76 to 84, inclusive) the Court of Appeals further approved the prolongation of respondent's monopoly of Parker's automatic stop control (when used in automatic push-button elevators) in contravention of the rule that the application of an old machine or instrumentality to a new and analogous use is not invention.

And the Court further violated the established rule that one who has substituted for one part of a known machine or apparatus, another part (even a novel one), cannot start afresh claiming over again the old machine or apparatus.**

As to the claims of the Lindquist *et al* patents, which are charged to be infringed, they are predicated solely on the fact that Lindquist *et al* substituted for the single push-button at each floor landing, in the Larson patent, the two push-buttons, an "up" button and a "down" button, which were found in Parker's automatic stop control. The effect, and the only effect, of this was to separate the push-button registering circuits, in precisely the same way and

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Rogers v. *Fitch*, 81 Fed. 959, 961-2, C. C. A. 2; *Fruehauf Trailer* v. *Highway*, 54 F. (2d) 691, 692-4, D. C., E. D. Mich., S. D.; *Goodbody* v. *Firestone*, 23 F. (2d) 625, 626, C. C. A. 6; *Black & Decker* v. *Baltimore Truck*, 26 F (2d) 686, 689, D. C., D. Md.

**Lincoln, etc., Co.* v. *Stewart-Warner Corp.*, 303 U. S. 545, 549, 550 and cases there cited.

for precisely the same purpose that they were separated in Parker so that the elevator car would respond to (collect) only the "up" calls on the up journey and the "down" calls on the down journey.

There is nothing in the opinion of the Court of Appeals to indicate why this was supposed to amount to invention. It is not suggested that the circuit arrangements used by Lindquist et al for this purpose are any different from the circuit arrangements used by Parker for the same purpose. There is no suggestion in the patent or elsewhere that this substitute in the system of one of arrangements of floor buttons for another presented any difficulty or that it was motivated by any other purpose than to incorporate in the Lindquist *et al* system the same advantages that an "up" button and a "down" button at each floor gave to the Parker system. The claims relied upon, of which claim 11 is typical are thus invalid for lack of invention.

These claims are furthermore invalid for another reason. They assume to represent that the patentees produced a new combination, when in fact all they have done is to substitute for one hall button element of the old combination (Larson's single buttons) another old hall button arrangement (Parker's "up" and "down" buttons). Under those circumstances, on the authority of an old and well established rule of the patent law, the claims are invalid. They would be invalid for that reason even if the substituted element were in itself new.*

No one should know this better than respondent Otis Elevator Company, since in *Otis Elevator Co.* v. *Portland Co.*, 127 Fed. 557, the 1st Circuit Court of Appeals said (p. 561):

**Lincoln, etc., Co.* v. *Stewart-Warner*, 303 U. S. 545, 549-50; *Perry* v. *Co-Operative Foundry*, 12 Fed. 436, 438, C. C., N. D., N. Y.; *McGrath* v. *Anzell*, 58 F. (2d) 205, C. C. A. 2; *Langan* v. *Warren Axe & Tool Co.*, 184 Fed. 720, 721, C. C. A. 3; *Radio Corp.* v. *Lord*, 28 F. (2d) 257, 260, C. C. A. 3; *Kodel* v. *Warren*, 62 F. (2d) 692, 694, C. C. A. 6; *Backstay* v. *Zenite*, 293 Fed. 23, 24, C. C. A. 7; *Dixie-Vortex Co.* v. *Lily Tulip Cup Corp.*, 37 U. S. Pat. Q. 158, 161, C. C. A. 2.

"The patentee cannot subsequently start afresh and say: 'I have now another machine, which is exactly like the old one in the use of the generic idea. I desire a patent upon it, but I do not claim the feature in which the machine of my new application differs from the old, but I claim what is exactly the same as is in the old. I claim that machine again, and all others containing the same invention.' Yet this is substantially the case before us." (127 Fed. 561.)

Conclusion

We respectfully submit, therefore, that under the circumstances and for the reasons stated in the petition and elaborated in the brief, the petition should be granted.

William H. Davis,
Willis H. Taylor, Jr.,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 372

STALEY ELEVATOR CO., INC.,

Petitioner,

and

570 BUILDING CORPORATION, SAMUEL COHEN AND JACOB C. COHEN,

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vs.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1938

No. 372

STALEY ELEVATOR CO., INC.,
Petitioner,

AND

570 BUILDING CORPORATION, SAMUEL COHEN and JACOB C. COHEN,
Petitioners,

VS.

OTIS ELEVATOR COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is an ordinary patent case.* It presents no conflict of decision between Circuit Courts of Appeal, no matter of public interest, no important question of law nor any of the other grounds for certiorari stated in Rule 38, Subdivision 5(b) of the rules of this Court. The Petition presents the familiar attempt of the defeated party in such a suit to seek a review by this Court, notwithstanding

* The decision of the Circuit Court of Appeals for the Second Circuit is reported at 38 U. S. P. Q. 502.

that rule. The case turned on the usual issue of patentable invention, as to which the District Court and the Circuit Court of Appeals unanimously held the patents valid and infringed. The Petition for rehearing was denied by the Circuit Court of Appeals (R. IV, 2094).

Statement of the Case

Petitioners' "Summary Statement of the Matter Involved" is largely argumentative. Much stated as fact is erroneous and contrary to the "Findings of Fact" made by the trial Court (R. IV, 2018-27) and approved by the Circuit Court of Appeals. Correction can be most tersely made by reference to the Findings of Fact below, as follows:

The subjects of respondent's patents are as stated in Finding of Fact No. 7 (R. IV, 2020).

The parallelism of petitioners' elevators and the patented inventions, and the consequent clear infringement is as stated in Findings of Fact Nos. 9 and 10 (R. IV, 2021-22).

The disclosure of respondent's earlier Parker reissue patent 16,297 is as stated in Finding of Fact No. 12 (R. IV, 2022).

The facts proving the validity of respondent's patents over the Parker patent and the S. O. B. system are as stated in Findings of Fact Nos. 12, 13 and 14 (R. IV, 2022-24).

That the applications for all three patents were copending (actually before the same Examiner); that a clear line of differentiation between them was preserved; and that the Patent Office allowed respondent's patents with full knowledge of the Parker invention appears from Finding of Fact No. 17 (R. IV, 2025).

The claims of respondent's patents are for new combinations, which meet every requirement of valid patentability (Finding of Fact No. 11, R. IV, 2022).

ARGUMENT

I.

The cases cited by petitioners as sustaining the jurisdiction of this Court do not apply.

In each of the cases cited on page 10 of Petitioners' Brief there were dissenting or conflicting opinions of the lower courts.

In *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664, the Circuit Court of Appeals had first affirmed the District Court *per curiam*, and later reversed itself by divided Court on rehearing.

In *Carbice Corp. of America* v. *American Patents Development Corp. et al.*, 283 U. S. 27, the District Court had found no infringement, while the Circuit Court of Appeals had held the patent valid and infringed.

In *Simmons* v. *Greer*, 258 U. S. 82, the Circuit Court of Appeals for the Third Circuit had held the patent invalid, the Circuit Court of Appeals for the Second Circuit had held the patent valid and infringed, and the latter was sustained by this Court. The complainant then sought further relief against the Third Circuit defendant and was granted such relief by the District Court whose decision was reversed by the Court of Appeals for the Third Circuit.

In the present case there is no conflict of decisions. The District Court (Judge Moscowitz) and the Circuit Court of Appeals for the Second Circuit (Judges Manton, Swan and Chase, in a unanimous Opinion) have both held respondent's patents to be valid and infringed.

II.

No important question of law is involved.

This is merely an ordinary patent case and petitioners seek certiorari merely to secure a review of fact evidence. In such cases this Court properly declines to grant certiorari, or to review the facts.

Layne and Bowler Corporation v. *Western Well Works*, 261 U. S. 387, 388;
Keller v. *Adams-Campbell Co.*, 264 U. S. 314, 319;
Washington Securities Co. v. *United States*, 234 U. S. 76;
United States v. *Commercial Credit Co.*, 286 U. S. 63, 67;
Thomson Spot Welder Co. v. *Ford Motor Co.*, 265 U. S. 445, 447;
Concrete Appliances Co. v. *Gomery*, 269 U. S. 177, 180.

III.

No question of interest of the public is involved.

Instead of a "public interest" being involved, this case is merely concerned with a defendant (Staley) whose confessed policy is to disregard everybody's patents (R. I, 512).

IV.

The decision below does not prolong any patent monopoly.

Respondent's Parker Reissue Patent 16,297 expires August 26, 1941. After expiration of the Parker patent, its disclosure may be freely made, sold and used without

infringing any claim of either of respondent's patents involved herein. Accordingly there is no legal basis whatever for the petitioners' alleged "Reason for Allowance of Writ" designated as (1) on page 8 of the Petition.

Indeed, the Petition does not deny the independent scope of respondent's patents. Its charge of prolonging the monopoly is stated to be

> "in contravention of the rule that the application of an old machine or instrumentality to a new and analogous use is not invention" (Petition, p. 8).

This, however, is but a contention that the subject matter of respondent's patents did not require "the exercise of patentable invention". That defense in turn involves purely issues of fact, not issues of law.

Thomson Spot Welder Co. v. *Ford Motor Co.* (*supra*);
Haines v. *McLaughlin*, 135 U. S. 584, 597;
United States v. *Esnault Pelterie*, 299 U. S. 201, 205.

V.

The decision below is amply justified by the Record.

The decision holds that respondent's patents are valid and that petitioners have infringed the same by making and using elevators which embody *the same or equivalent means in the same patented combinations.* The Statutes require that patents may be granted only for "useful" inventions. Every patent, therefore, inherently covers "a desired end". Respondent's patents cover certain specific new combinations of integrated elements. Petitioners and the public are free to accomplish the ultimate "result" without infringing, if they confine themselves either to *a different or non-equivalent combination of means.*

This case does not conflict in the slightest with the decisions of this Court, such as *Holland Furniture Co.* v. *Perkins Glue Co.*, 277 U. S. 245, 257 cited by petitioner, which hold patents invalid as claiming "functions and effects" irrespective of means, and thus purporting to comprehend more than the patentee's contribution. The decision below finds that the claims of respondent's patents call for combinations of elements which are present in petitioners' system. As to three minor differences which were relied upon by petitioners below to support their argument of non-infringement, the Court specifically found each an "equivalent" (R. IV, 2055-56). There is not mere correspondence of "end", there is correspondence of means.

Morley Machine Co. v. *Lancaster*, 129 U. S. 263, 273;
Machine Co. v. *Murphy*, 97 U. S. 120, 125;
Tempco Electric Motor Co. v. *Apco Manufacturing Co.*, 275 U. S. 319, 328.

Thus petitioners' "Reason for Allowance of Writ", designated as (2) on page 8, is also but a reasserted defense of non-infringement, which in turn depends solely on questions of fact and not on questions of law.

VI.

The Lindquist *et al.* patent does not cover an old combination including merely a new part.

Petitioners' next "Reason for Allowance of Writ", designated as (3) on page 9 of the Petition, is a reasserted argument, against only the second patent in suit (not against the first), that it covers an old combination including merely a new part. This alleged reason postulates that the Lindquist *et al.* patent claims an old combination.

That postulate, however, was a fact issue in the case, and the lower court decisions both held against petitioners on the facts. Accordingly while petitioners pretend to raise issues of law, here again they are in reality arguing only issues of fact.

Respondent denies that the Lindquist *et al.* patent covers an old combination. On the contrary, this patent comprises plural integrated means cooperating to provide a new combination of means, and *per* both decisions below, the new combination possesses all the attributes of patentability including the exercise of patentable invention in its conception and embodiment.

VII.

Respondent has not entered into an unlawful agreement to monopolize the industry.

Petitioners' Brief states that respondent and Westinghouse Electric & Manufacturing Company have "pooled their competitive patents" (Petition, p. 12). Such an issue was not pleaded below and is now made in reckless disregard of the truth on a wholly misleading and incomplete quotation from the Record. Petitioners' reference to the matter can hardly be in good faith and is certainly improper.

Moreover, such an issue may not be raised in an action for infringement (*cf.* Walker on Patents (Deller's Edition, 1937) Volume II, p. 1590 § 409, and cases cited).

The cross license agreement between respondent and Westinghouse naturally provided that neither licensor would assert any patent against the other so far as concerned the subject elevators made under the specifically licensed patent (R. IV, 1807-10).

VIII.

There was no misrepresentation or concealment before the Patent Office.

Respondent's patents were granted by the Patent Office with full knowledge of the fact of Parker's invention, and of the distinct patentable differences of Larson and of Lindquist *et al.* thereover. The argument to the contrary, advanced on page 7 of Petitioners' Brief, is not only untrue but is absurd, because the Patent Office itself cited Parker against the Larson application while pending, and both patents in suit were allowed by the Patent Office not in ignorance of the priority of Parker but on a finding (coincident with the later decisions of the Courts below, *cf.* R. IV, 2025, 2053-55) that the Larson and Lindquist *et al.* inventions were respectively different from and involved the exercise of patentable invention over Parker's invention, and that the claims are distinctive in scope.

Conclusion.

It is respectfully submitted that the Petition should be denied.

EDWIN W. SIMS,
C. V. JOHNSON,
L. A. WATSON,
Counsel for Respondent,

September 29, 1938.

IN THE

Supreme Court of the United States

OCTOBER TERM 1938

No. 372

STALEY ELEVATOR CO., INC.,

Petitioner,

and

570 BUILDING CORPORATION, SAMUEL COHEN and JACOB C. COHEN,

Petitioners,

vs.

OTIS ELEVATOR COMPANY,

Respondent.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM H. DAVIS,
WILLIS H. TAYLOR, JR.,
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ACKERMAN PRESS, Inc., 142 Liberty St., 'Phones Rector 2-5856-7

Supreme Court of the United States

OCTOBER TERM, 1938

No. 372

STALEY ELEVATOR CO., INC.,

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and

570 BUILDING CORPORATION, SAMUEL COHEN and JACOB C. COHEN,

Petitioners,

vs.

OTIS ELEVATOR COMPANY,

Respondent.

PETITION FOR REHEARING

To the Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Respondent brought suit against petitioners, alleging infringement of two patents relating to "collective" automatic push-button elevators. The District Court held both patents valid and infringed, and the Court of Appeals for the Second Circuit affirmed the decree of the District Court.

On October 24th last, this Court denied our petition for a writ of certiorari herein.

There is no conflict of decisions, as between different Circuits, on the question of validity of these patents. How-

ever, due to the peculiar situation of the elevator industry, particularly in view of the fact that respondent, Otis Elevator Company, and Westinghouse Electric & Mfg. Company, its largest competitor, have pooled their competitive patents, including the patents here involved, by a "royalty-free" agreement (IV, 1807-10), there is only the most remote possibility that any other Circuit Court of Appeals will ever be afforded an opportunity to pass upon the validity of the patents, notwithstanding the doubtful validity thereof.

While there are approximately one hundred elevator manufacturers in the United States and some appear in competition with respondent only intermittently, there are possibly six or seven elevator companies who bid on specifications that are generally descriptive of "collective" automatic push-button elevators. Of these, respondent, as the record shows, has licensed three elevator companies so that petitioner and perhaps two or three others are among the remaining competitors. In view of the elevator business done within the Second Circuit where the Courts are committed on the validity of the patents, respondent can thus achieve its purpose without extending litigation beyond the Second Circuit or against other than small manufacturers who could not reasonably be expected to finance such litigation under existing circumstances.

We have no quarrel with the rule which absolves this Court, in the absence of a conflict of decisions, from granting a writ of certiorari in an ordinary patent case involving ordinary issues of validity and infringement[1]. In the usual course of patent litigation, the opportunity exists and is exercised of having suits brought and determined in several Circuits involving the same or substantially the

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[1]Keller v. Adams-Campbell Co., 264 U. S. 314, 319; Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U. S. 387, 392, 393.

same issues of validity and infringement, and in this process it may be reasonably expected that issues of fact will be thoroughly explored; that upon such full investigation by the Courts primarily charged with the duty of determining patent controversies, any reasonable grounds for a difference in view upon questions of law will find abundant opportunity for judicial expression, and that ultimate conflicts of view may be limited to some only of the issues involved. But the instant decision of the Circuit Court of Appeals for the Second Circuit is not the mere beginning of patent litigation which will be extended into the several Circuits.

By reason of peculiar circumstances, the respondent is in a position to confine this litigation to the Second Circuit where the Circuit Court of Appeals is committed to the view that the patents are valid.

As respondent's witness, Mr. Peterson, explained (I, 283)—"There are approximately 100 elevator manufacturers in the United States. Some appear in competition only intermittently." And (I, 274)—"There are possibly six or seven elevator companies who bid on specifications that are generally descriptive of the *collective* control system * * *".

Respondent has issued three licenses (I, 255) under the suit patents—to the Westinghouse Elevator Company (IV, 1807-10), the Atlantic Elevator Company (IV, 1817-23), and to the Houghton Elevator Company (IV, 1811-17). That leaves petitioner, Staley Elevator Company, and either two or three other manufacturers to make up the remaining competitors of the "six or seven".

Numerically, most of respondent's sales of "collective" automatic push-button elevators have been in seven-story (six floors and basement) apartment houses (I, 255). The re-housing building plans, particularly those in the Second Circuit of which the New York City plans are the largest, will in general follow the usages of the seven-story build-

ings now in vogue and undoubtedly the use of "collective" automatic push-button elevators will be specified. Then, too, the building of such seven-story apartment houses by private operators is proceeding apace within the Second Circuit, notably New York City.

Having such complete jurisdiction of the largest field of apartment-house building operations, the decision of the Second Circuit Court of Appeals will be the last word upon the validity of the suit patents unless this Court intervenes. The apartment-house owners buy and use the "collective" automatic push-button elevators and hence are chargeable with infringement, notwithstanding that the elevator control and equipment apparatus may have been fabricated without the Second Circuit.

It is not reasonable to expect that respondent will go outside the Second Circuit to sue elevator manufacturers when it can cut off the most important of the manufacturer's outlets by bringing suit against an apartment-house owner in the Second Circuit, where the patents have been sustained as valid.

Respondent has maneuvered so as to be in such a position that, if it won in the Second Circuit, it would have practically all the relief it needed and could then rely upon this Court's general rule with reference to the necessity of conflict of decisions to avoid a review of the validity of its patents by this Court, but in the event that it lost in the Second Circuit, it could still sue elsewhere. Respondent thus had a multiple legal opportunity, but the apartment-house builder within the Second Circuit and the elevator manufacturers have no such alternative to fall back on.

Under the circumstances shown, we submit the general rule of this Court that a conflict of decisions is prerequisite to a review of patent cases, works a hardship upon the elevator manufacturing industry but offers an advantage to respondent. In the very recent decision of *The Schriber-Schroth Company* v. *The Cleveland Trust Company, Chrys-*

ler Corporation; The Aberdeen Motor Supply Company v. *Same; The F. E. Rowe Sales Company* v. *Same,* 39 U. S. Pat. Q. 242, the Court said (p. 243):

> "We later granted certiorari, U. S. , on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit. Cf. Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464 [24 USPQ 303]; Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp., 294 U. S. 477 [24 USPQ 308]."

In the instant case, there would appear to be reasons at least as cogent for relaxing the general rule of this Court as in the *Schriber-Schroth Case* and *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.,* 294 U. S. 477.

In our petition for a writ of certiorari, we contended, correctly we think, that the decision of the Second Circuit Court of Appeals was in discord with various decisions of this Court. It is deemed unnecessary to repeat them here, except to pray the Court to re-examine the points brought out by the petition and, unless the Court is satisfied of the soundness of the decision below, to grant the writ.

Wherefore, it is prayed that the petition for writ of certiorari in the above-entitled cause be re-examined and reconsidered with the view that, if the Court deems the decision of the Circuit Court of Appeals to be unsound in any respect on the issues of validity of the patents, the writ should be granted.

Respectfully submitted,

WILLIAM H. DAVIS,
WILLIS H. TAYLOR, JR.,
Counsel for Petitioners.

Dated, November 16, 1938.

Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WILLIAM H. DAVIS,
WILLIS H. TAYLOR, JR.,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 372.

STALEY ELEVATOR CO., INC.,

Petitioner,

and

570 BUILDING CORPORATION, SAMUEL COHEN AND JACOB C. COHEN,

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Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWIN W. SIMS,
C. V. JOHNSON,
L. A. WATSON,
Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 89 Lafayette St., New York, N. Y.

Supreme Court of the United States

OCTOBER TERM 1938

No. 372

STALEY ELEVATOR CO., INC.,
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570 BUILDING CORPORATION, SAMUEL COHEN and JACOB C. COHEN,
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vs.

OTIS ELEVATOR COMPANY,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING

The petition for rehearing rests solely on an argument that

> "there is only the most remote possibility that any other Circuit Court of Appeals will ever be afforded an opportunity to pass upon the validity of the patents, notwithstanding the doubtful validity thereof" (Petition, p. 2).

There is no factual support for the statement quoted.

1. There is no basis for petitioners' argument—and it is absurdly untrue—that the building industry suitable

for installation of the patented elevator systems is geographically confined to New York City or to the area of the Second Circuit. (Petitioners do not pretend that the elevator manufacturers are concentrated in the Second Circuit; the fact being that there are more than one hundred elevator manufacturers widely distributed throughout the United States.)

This Court may certainly take judicial notice of comparable building activities in Boston, Chicago, Philadelphia, St. Louis, and Los Angeles, to mention only a few conspicuous cities in the various other circuits. Respondent has already given notice of infringement to a manufacturing company in Illinois, which has installed infringing elevators in Kansas City and elsewhere.

The above facts sharply distinguish the present case from the "improbable litigation elsewhere because of the concentration of the automobile industry" in *The Schriber-Schroth Company* v. *The Cleveland Trust Company,* 39 USPQ 242 (cited by petitioners).

2. There is no basis for characterizing either of the patents in suit as of "doubtful validity."

There was no expressed or implicit doubt in the opinion of the District Court, after full trial, that both patents are clearly valid and were clearly infringed.

There was no dissent and no hint of uncertainty in the independent opinion of the Circuit Court of Appeals for the Second Circuit, which affirmed the lower court.

In the petition for certiorari (heretofore denied) petitioners did not rely on any items of the prior art different from those considered by the Patent Office precedent to the allowance of the patents in suit and found non-anticipatory by it and by the courts below.

The above facts also sharply distinguish the present case from the "doubtful validity" in *The Schriber-Schroth Company* v. *The Cleveland Trust Company,* 39 USPQ 242, where the special master had made elaborate findings

and had held the patents invalid on each of multiple grounds and where the District Court had also adopted the same findings and conclusions (*id.* p. 243).

3. The petition also asserts that respondent and Westinghouse "have pooled their competitive patents by a royalty-free license". The statement is untrue and is merely a repetition of an argument presented in the prior denied petition for certiorari, which was answered in Respondent's Brief in Opposition to Petition for Writ of Certiorari, page 7. Petitioners seek to argue that this also means there will be no further litigation outside the Second Circuit, but this argument is belied by the large number of elevator manufacturers throughout the United States and by the fact that one of them has already been notified of its infringement.

4. Petitioners have had their day in court, with unhampered opportunity to present every shadow of defense. Not one of such defenses is shown to have impressed either the trial judge or any of the appellate judges.

The petition for rehearing accordingly makes no showing adequate to bring the case in the reviewable category indicated by the rules or by the decisions of this Court. It should be denied.

Respectfully submitted,

EDWIN W. SIMS
C. V. JOHNSON
L. A. WATSON
Counsel for Respondent.

November 18, 1938.

GRAVES ET AL., COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF NEW YORK, *v.* ELLIOTT ET AL.

CERTIORARI TO THE SURROGATES' COURT OF THE COUNTY AND STATE OF NEW YORK.

No. 372, October Term, 1937. Argued January 9, 1939. Reargued April 28, 1939.—Decided May 29, 1939.

Decedent, while domiciled in Colorado, transferred to a Colorado bank certain bonds to be held upon certain specified trusts with specified powers in the trustee to administer, invest, reinvest, etc. The trust indenture provided that the trustee should pay over the income to decedent's daughter for life and afterward to the daughter's children until each had reached the age of twenty-five years, when a proportionate share of the principal of the trust fund was to be paid over to such child. In default of such children the principal was to revert to decedent and pass under her will. She reserved the right to remove the trustee, to change any beneficiary of the trust, and to revoke the trust and revest herself with the title to the property, the trustee in that event undertaking to assign and deliver to her all the securities then constituting the trust fund. After creating the trust decedent became and remained a domiciled resident of New York, where she died without appointing new beneficiaries of the trust or revoking it. Meanwhile, the trustee continued to administer the trust and held possession of the bonds evidencing the intangible property of the fund. Following her death the taxing authorities of Colorado assessed a tax on the transmission at death of the trust fund.

Held that the State of New York could constitutionally levy a

transfer tax upon the relinquishment at death of the power of revocation, measured by the value of the intangibles. *Curry* v. *McCanless*, *ante*, p. 357. P. 386.

274 N. Y. 10, 634; 8 N. E. 2d 42; 10 N. E. 2d 587, reversed.

CERTIORARI, 305 U. S. 667, to review a judgment, entered on remittitur from the Court of Appeals of New York, which reversed an order of the Surrogates' Court confirming a transfer tax assessment. 248 App. Div. 713; 153 Misc. 70.

Mr. Mortimer M. Kassell, with whom *Mr. Harry T. O'Brien, Jr.* was on the brief, on the reargument and on the original argument, for petitioners.

Mr. Frederick C. Bangs, on the reargument and on the original argument, for respondents.

By leave of Court, *Messrs. David T. Wilentz*, Attorney General of New Jersey, *William A. Moore*, Assistant Attorney General, *Paul A. Dever*, Attorney General of Massachusetts, and *Henry F. Long* filed a brief, as *amici curiae*, on behalf of those States, in support of petitioners.

MR. JUSTICE STONE delivered the opinion of the Court.

We are asked to say whether the State of New York may constitutionally tax the relinquishment at death, by a domiciled resident of the state, of a power to revoke a trust of intangibles held by a Colorado trustee.

Decedent in 1924, while a resident of Colorado, transferred and delivered to Denver National Bank of Denver, Colorado, certain bonds to be held upon specified trusts with specified powers in the trustee to administer the trust and to invest and reinvest the trust fund. So far as now material, the trust indenture provided that the trustee should pay over the income to decedent's daughter for life and afterward to the daughter's children until

each had reached the age of twenty-five years, when a proportionate share of the principal of the trust fund was to be paid over to such child. In default of such children the principal was to revert to decedent and pass under her will. She reserved the right to remove the trustee, to change any beneficiary of the trust, and to revoke the trust and revest herself with the title to the property, the trustee in that event undertaking to assign and deliver to her all the securities then constituting the trust fund.

After creating the trust decedent became and remained a domiciled resident of New York, where she died in 1931 without appointing new beneficiaries of the trust or revoking it. Until her death the trust was administered by the bank at its offices in Colorado, and the paper evidences of the intangibles—corporate bonds—comprising the trust fund remained in the possession of the trustee in Colorado.

Following her death the taxing authorities of Colorado assessed a tax on the transmission at death of the trust fund. Proceedings in New York for the assessment of estate taxes on the transfer of the trust fund at decedent's death resulted in an order of the Surrogate confirming the assessment under §§ 249–n, 249–r of the New York Tax Law. Consol. Laws, ch. 60.[1] On appeal the New York

[1] § 249–n imposes a tax at specified rates upon the net estate of every person dying a resident of the state. For the purpose of fixing the amount of the net estate, § 249–r includes in the value of the gross estate of the decedent the value of all property of the decedent "except real property situated and tangible personal property having an actual situs outside this state,"

"3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (a) the possession or enjoyment of, or the income from, the property or

Court of Appeals reversed the order of the Surrogate, holding that so far as the provisions of the New York Tax Law purport to include the intangible trust property in the gross estate they infringe due process by imposing a tax on property whose situs is outside the state. 274 N. Y. 10. We granted certiorari November 14, 1938, the question involved being of public importance

The essential elements of the question presented here are the same as those considered in *Curry* v. *McCanless, ante,* p. 357. As is there pointed out, the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation. *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85; cf. *Keeney* v. *New York,* 222 U. S. 525; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Chase National Bank* v. *United States,* 278 U. S. 327; *Tyler* v. *United States,* 281 U. S. 497; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509; *Porter* v. *Commissioner,* 288 U. S. 436.

For reasons stated in our opinion in *Curry* v. *McCanless, supra,* we cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so

(b) the right to designate the persons who shall possess or enjoy the property or the income therefrom; . . .

"4. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

dissociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles. Her right to revoke the trust and to demand the transmission to her of the intangibles by the trustee and the delivery to her of their physical evidences was a potential source of wealth, having the attributes of property. As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death. *Curry* v. *McCanless, supra,* and cases cited.

Reversed.

MR. CHIEF JUSTICE HUGHES, dissenting.

I think that the decision in this case pushes the fiction of *mobilia sequuntur personam* to an unwarranted extreme and thus unnecessarily produces an unjust result.

The same property is subjected to an inheritance or transfer tax by two States. The decedent, in 1924, while a resident of Colorado, created a trust in certain securities, consisting of federal, state and other bonds. The trustee was a Denver bank. The income of the trust property was payable to the settlor's daughter during her life and thereafter to her children until they respectively arrived at the age of twenty-five years, when they were to have the principal in equal shares. If the daughter left no children, the trust estate was to revert to the settlor. The settlor reserved the right to change the beneficiaries, to revoke the trust, and to remove the trustee. The legal title to the securities was thus vested in the trustee, which entered upon its administration and continued it both

before and after the settlor's death. There was no revocation of the trust or change of beneficiary or trustee, or diversion of the income from the use of the daughter, and the beneficiaries were all living when the settlor died.

Prior to her death, the settlor removed to New York. The trust *res* continued to be in Colorado. An inheritance tax upon the decedent's property situated in Colorado, and including the bonds held there in trust, was imposed by that State. The New York Court of Appeals has held, and I think rightly, that this trust property was not subject to an estate tax in New York. 274 N. Y. 10.

It is true that the Constitution of the United States contains no specific provision against double taxation, but the Constitution does impose limitations upon the taxing power of a State which I think are applicable and should prevent a double exaction in this case.

The principle governing the application of the due process clause of the Fourteenth Amendment to the State's taxing power is well established. That principle, as repeatedly declared by this Court, and apparently not disputed now, is that it is "essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power." *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 204. What is meant is that due process in taxation requires that the property shall be attributable to the domain of the State which imposes the tax. This rule has its most familiar illustration in the case of land which, to be taxable, must be within the limits of the taxing State. The fact that the owner is domiciled within a State, if the land is elsewhere, does not give the State of his domicile the authority to tax. In *Union Transit Co.* v. *Kentucky, supra*, we held that the principle against the taxability of land within another jurisdiction applies with equal cogency to tangible personal property having an actual situs outside the State's domain. True, the fiction expressed in the maxim *mobilia*

sequuntur personam might have seemed to justify such a tax on personal property by the State of the owner's domicile. But as said in *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22: "The old rule, expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used."

The rule thus established that the State of the owner's domicile cannot tax tangible personal property which has an actual situs in another State was applied by this Court to an inheritance or transfer tax in the case of *Frick* v. *Pennsylvania,* 268 U. S. 473. There the Court held, without division, that to tax the transfer of tangible personal property having an actual situs in another State "contravenes the due process clause of the Fourteenth Amendment." The importance of this limitation of state power is obvious in view of the interrelation of the States under the bond of the Constitution, and of the opportunities for oppressive taxation if States attempt to tax property or transfers of property not properly attributable to their own domain. "The limits of State power are defined in view of the relation of the States to each other in the Federal Union." *Burnet* v. *Brooks,* 288 U. S. 378, 401.

But while the question was thus settled as to tangible personal property, the fiction of *mobilia sequuntur personam* still persists in a general sense as to intangibles, embracing securities, thus permitting taxation by the State of the owner's domicile although the owner may

keep the securities in another State. *Blodgett* v. *Silberman*, 277 U. S. 1, 9, 14, 16. This general rule proceeds in the view that intangibles, as such, are incapable of an actual physical location and that to attribute to them a "situs" is to indulge in a metaphor. Still, in certain circumstances the use of the metaphor is appropriate. *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366, 372.

The fact that this rule of convenience may generally be applied does not justify the conclusion that intangibles can never be so effectively localized in another State as to withdraw them from the taxing power of the domiciliary State. The proper use of a legal fiction is to prevent injustice and it should not be unnecessarily extended so as to work an injury. *Union Transit Co.* v. *Kentucky*, *supra*, p. 208.

As we said in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, 92, the fiction of *mobilia sequuntur personam* "must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise." In that case, a resident of Virginia had transferred certain securities to the Safe Deposit & Trust Company of Baltimore in trust for his minor sons. The donor reserved to himself a power of revocation. He died without having exercised it. Virginia undertook to impose an *ad valorem* tax upon the entire corpus of the trust estate and this Court held that as the securities were subject to taxation in Maryland, where they were in the actual possession of the trustee, the holder of the legal title, they had no legal situs for taxation in Virginia "unless the legal fiction *mobilia sequuntur personam* was [is] applicable and controlling." The Virginia court had held that the two beneficiaries in conjunction with the administrator of the father's estate really owned the trust fund and that by reason of the fiction its taxable situs followed them.

This Court refused to accept that view and denied the right of taxation to Virginia, saying: "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."

That was a case of an *ad valorem* property tax. But the power to impose an inheritance or transfer tax, as well as the power to impose an *ad valorem* property tax, depends upon the property being attributable to the domain of the taxing State. *Frick* v. *Pennsylvania, supra,* p. 492.

In the instant case, the legal title to the property in question is in the Colorado trustee, the trust was created under the Colorado law and its administration is subject to the control of Colorado. To say that these securities are not as effectively localized in Colorado, as were the furniture, pictures and other art treasures of Mr. Frick in New York and Massachusetts, where alone their transfer could be taxed, would be to ignore realities and to make important rights turn upon a verbal distinction.

Upon what ground then is it maintained that these securities are within the taxing power of New York? Solely, it appears, upon the ground that the indenture creating the trust in Colorado reserved to the settlor a power of revocation. This unexercised power is treated as carried by the settlor into New York and hence as bringing in its train the entire corpus of the trust property. That results, as already noted, in giving the fiction an oppressive operation. But, aside from that practical aspect, if through the trust in Colorado the securities have been effectively localized in that State, why should an unexercised power of revocation alter their status? Mr. Frick did not even need to revoke an instrument, for at

any time he could have removed his furniture and art treasures from New York and Massachusetts to his domicile in Pennsylvania. But that obvious control, while unexercised, did not detract from the taxing power of the States where the property was, or permit taxation by the domiciliary State.

It is said that the power of disposition is equivalent to ownership, and that its relinquishment at death is an appropriate subject of taxation. The case of federal taxation is not analogous as there are no state boundaries to be considered when the federal tax is laid. Nor are state cases relevant when there is no attempted extraterritorial application of a state statute, and it is not necessary again to review the authorities cited in the dissenting opinion in *Curry* v. *McCanless*, *ante*, p. 357. For the present purpose it is sufficient to note that under the principle established in *Frick* v. *Pennsylvania*, it is not enough to say that a power of disposition is equivalent to ownership, for ownership by a resident of a State gives that State no authority to tax property not attributable to its domain. Mr. Frick owned his property in New York and Massachusetts but still his own State of Pennsylvania could not tax its transfer.

The fundamental question is thus not one of a reserved but unexercised power of revocation or of an ultimate control in an owner, but whether securities, classed as intangibles, are necessarily and in all circumstances subject to a different rule from that obtaining in the case of tangible personal property. It is not perceived that there is a sound basis for such an invariable distinction, which is foreign to common thought and practical needs. When confronted with the question as to tangible personal property, we did not hesitate to limit the application of the fiction, and it is regrettable that we can not deal with the fiction in a similar fashion in such a case as this, where

we have an effective localization of securities through a trust created in a State other than that of the settlor's domicile at the time of death, and where in that other State the trustee holds title and possession and has been and is administering the trust subject to its laws.

I think that the judgment of the Court of Appeals of New York should be affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and MR. JUSTICE ROBERTS concur in this opinion.